United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,034

ROBERT E. LEEPER, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed January 21, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on January 2, 1963

THE UNITED STATES OF AMERICA)	Criminal No. 53-63
v.)	Grand Jury No. 1479-62
ROBERT E. LEEPER, JR.)	Violation: 22 D.C.C. 2901 (Robbery)

The Grand Jury charges:

On or about December 22, 1962, within the District of Columbia, Robert E. Leeper, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Caroline V. Donnelly, property of Caroline V. Donnelly, of the value of about $5.00, consisting of $5.00 in money.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:
/s/ Carl J. Whelan
Foreman

[Filed January 25, 1963]

PLEA OF DEFENDANT

On this 25th day of January, 1963, the defendant Robert E. Leeper, Jr., appearing in proper person and by his attorney Gary Bellow, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

MATTHEW F. MC GUIRE
Presiding Judge
Criminal Court # Assignment

Present:

Harry M. Hull, Clerk

United States Attorney
By John Treanor
Assistant United States Attorney

By /s/ H. G. Dodd
Deputy Clerk

J. Rawls
Official Reporter

[Filed September 5, 1963]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
Thursday, Feb. 21, 1963

The above-entitled matter came on for trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, and a jury at 10:15 a.m.

APPEARANCES:

For the Government:

VICTOR W. CAPUTY, Ass't U. S. Attorney

For the Defendant:

PAUL E. MILLER, Esq.

* * * * *

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

BY MR. CAPUTY

MR. CAPUTY: If Your Honor pleases, members of the jury: the Grand Jury charges that on or about December 22, 1962, within the District of Columbia, Robert E. Leeper, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the

immediate actual possession of Caroline V. Donnelly, property of Caroline V. Donnelly, of the value of about $5.00, consisting of $5.00 in money.

In support of this indictment, the evidence will show that on this date, December 22, 1962, Caroline V. Donnelly left her home and was going to the mailbox which was at Kenilworth and Eastern Avenues, Northeast, around 4:30 in the afternoon. She was carrying a couple
11 Christmas cards, I believe, in her hand and she had $5.00 in her hand.

The evidence will show that as she was walking to the mailbox, she was grabbed and yoked by an individual who turned out to be this defendant; that she got away and was going towards that mailbox and when she got just near the mailbox that this defendant came along and struck her again and knocked her down, and took the $5.00 that she had in her hand.

If we can show that those are the facts and that they took place in the District of Columbia, at the proper time, we will ask you to return a verdict in accordance with this evidence.

MR. MILLER: I will reserve my opening statement, Your Honor.

THE COURT: Very well.

* * * * *

Whereupon,

CAROLINE V. DONNELLY

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name, please? A. Caroline Donnelly.

Q. Directing your attention to December 22, 1962, where were you living? A. 1807 Kenilworth Avenue, Northeast.

Q. Here in the District of Columbia? A. It is on the Maryland side.

Q. Directing your attention to that day, December 22, 1962, did there come a time that you left your residence that day? A. Yes.

Q. And about what time was it? A. It was about 4:30 in the afternoon.

Q. Of December 22? A. Of December 22nd.

Q. Where, if anywhere, were you going at that time when you left your home about 4:30 in the afternoon? A. I was going to the mailbox which is at Kenilworth and Eastern Avenue, and then I was going to stop at the store and pick up a few groceries.

Q. At the time that you were going to the mailbox, will you tell the Court and jury whether you had anything in your hand that you were going to the mailbox for? A. I had a five dollar bill, a note to get a few things at the store and two Christmas cards.

Q. Would you tell the Court and jury what, if anything, took place as you were walking headed towards this mailbox? A. Yes. As I was on my way, there were three men standing near Eastern Avenue and I passed them and as I got near to the one, he grabbed me around the neck and -- he stood in back of me and grabbed my neck and held me there for a couple of minutes, I guess it was. Then I managed to get away or he let me go. I don't know the exact circumstances but I started to run.

I ran across Eastern Avenue in the middle of the traffic and got on the other side, on the District side, and when I reached that side, he

5 ran across the street after me -- he had been running after me, he caught up to me and hit me on my nose and I fell to the ground. Then as I got up, he grabbed for my money and my cards and things that I held in my hand.

Q. Did you have any marks or bruises after you got hit, or bleeding? A. Yes, I was bleeding quite a bit.

Q. Now, did you see that person again after that happened? A. Yes, I saw him after the officer had arrested him.

Q. About how soon after this happened when you saw him again? A. I think it was probably within about ten minutes.

Q. Now, do you see here in the courtroom the person who grabbed you once and then you got away and then he pursued you and hit you, knocked you down and took your money? Do you see that person here in the courtroom? A. Well, I believe it's the --

MR. MILLER: Your Honor, I object.

THE COURT: To what do you object?

MR. MILLER: "I believe", Your Honor.

THE COURT: The witness is stating her conviction.

6 I don't think this is improper.

Go ahead.

BY MR. CAPUTY:

Q. Do you see him here in the courtroom? A. Yes.

Q. Would you point him out? A. That one there (indicating).

Q. Is this the person (indicating the defendant)? A. Yes.

MR. CAPUTY: May the record show, if Your Honor please, that the witness has identified the defendant?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. Did this that you have testified to happen in the District of Columbia? A. Yes.

MR. CAPUTY: That is all, Your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q. You pronounce your last name Donnelly? A. Yes.

Q. Is that Miss or Mrs.? A. Miss.

7 Q. Miss Donnelly, immediately after this offense, did you make any statement to the police officer on the scene at that time? A. I don't recall making any.

Q. Do you recall whether or not there did come a time when you discussed this matter with the police officers? A. I don't believe I did discuss it with the police officers.

Q. Did you ever give an account of what you have just stated to the Court and jury on direct examination to anyone before today? A. Well, yes, I guess I did. I did recite it to several people in the court.

Q. Did there come a time when these statements that you made were written down in your presence? A. Yes, I believe so.

Q. Did you read it over to find out whether or not it was --

A. No, I didn't read it.

Q. Did you sign it? A. No -- well, perhaps I did.

MR. MILLER: Your Honor, at this time, I move for the production of the statement.

8 THE COURT: Do you have a signed statement, Mr. Caputy?

MR. CAPUTY: I have no signed statement, Your Honor.

BY MR. MILLER:

Q. One other question with respect to this matter, Miss Donnelly: Do you recall prior to entering the Grand Jury room? A. Do I recall prior to entering the Grand Jury room?

Q. I am sorry. Let me ask you this question: Did you testify before the Grand Jury? A. Yes. I am really not too familiar with court terms but I am pretty sure I did. I did come to this court before, and I think it was before the Grand Jury.

Q. Before entering the Grand Jury room, do you recall whether or not you made the same statements that you have just related to the Court and jury to anyone on the outside of the Grand Jury room? A. I don't recall that I did.

Q. You stated in response to questions asked you by Mr. Caputy that you were walking towards the mailbox; is that correct? A. Yes.

Q. At that point, you noticed three people standing nearby? A. Yes.

9 Q. Were all of these three people Negroes? A. Yes.

Q. How were they dressed at the time when you first noticed them? A. Well, the one who grabbed me had some kind of a raincoat or trench coat on.

Q. What color was it? A. Well, I am a little -- I mean, everything happened so fast and I was so frightened. It was either a brownish green or brown. I mean, I am just not sure about the color but it was some kind of a trench coat.

Q. Do you recall what the other two gentlemen were wearing? A. I think one had a dark coat on of some kind but, as I said, it was all -- I didn't notice them until all of a sudden and the whole thing was so quick and I was so frightened that I didn't really get a good look at any of them.

Q. Now, exactly where were these three people standing? Were they standing near the mailbox? A. No, they were standing near a house.

Q. They were standing near a house. Was this before or after you passed the mailbox? A. This was before I got to the mailbox.

10 Q. And you did pass the three of them? A. Yes.

Q. Did it appear to you as if these three people were together at that time? A. Yes.

Q. After you passed the three, do you recall which one of these three individuals grabbed you behind your back? A. Yes.

Q. Which one? A. The one with the trench coat or an Army coat on.

Q. Could you tell at that time that this person had a trench coat on, that is, at the time that he grabbed you? A. Yes, I am pretty sure. It seemed to fix itself in my mind that he did have a raincoat on.

Q. Do you know of this fact because after the police officer confronted you with this person, this person possibly had on a green coat or someone in the area had on a green coat and you related it to the fact? A. No, I was aware of it before.

Q. You were aware of it before? A. Yes, uh-huh.

Q. Now, when you first approached these three people standing
11 near the house you have told us about, how far were you from them at that time when you passed them? A. Well, two or three feet, I guess.

Q. Two or three feet. Did you get a clear description of the three gentlemen standing there at that time? A. No, I didn't get a clear description. As I said, I was really trying to avoid looking at them. I just was minding my own business walking past.

Q. So, you really didn't see who they were at that time? A. I didn't try to get a good look at them at that time.

Q. Yes. So, after you passed them and this person grabbed you around the neck and you finally broke loose and ran down the street, when you first saw this individual or some other individual in presence of the police officers, what were the police officer's exact words when you approached them? Do you recall what he said to you? A. No, I don't recall.

Q. Did he say something to the effect, "Is this the man?" or "This is the man"? A. He said something to that effect.

Q. At that time, were you sure whether or not that was the person?
12 A. Well, I said that I recognized him by his clothes more than anything.

Q. That is all? A. Yes; and his general appearance, but mostly by his clothes.

Q. Because he had on a rain coat, you assumed this was the person; is that correct? A. Yes, and also in other respects.

Q. What are the other respects? A. Well, just his general look, I would say.

Q. What is that? A. Well, I don't think he is -- I mean, he is not particularly heavy set or anything.

Q. Would you say that the description that you are telling us about now would fit quite a few people? A. Well, perhaps yes.

Q. So you say that his general description at that particular time and because he had on a rain coat, you assumed that this was the person? A. Yes.

Q. Now, did you see any other persons standing in this area?

First let me ask you this: Did the police officers approach you with any other people at that time? A. No.

13 Q. They didn't.

Before you left the scene, did the police officers bring anyone else up? A. Just the other two men who were with him.

Q. The other two men. Are you sure that these were the other two men? A. Yes.

Q. Did you at that time see anyone else -- First, I will ask you this: Do you recall whether or not there was a crowd in the area at the time the police officers brought you face to face with this person? A. Yes.

Q. Do you recall whether or not anyone in this crowd had a similar type rain coat on that you are speaking of now? A. No; I didn't look around the crowd too much. I just know there was a large crowd there.

Q. So the police officer said, "Is this the man?" or "This is the man"? I am sorry, I don't recall what you said before. A. "Is this the man?" And I said, "I believe so," or words similar to that. As I said, I was so frightened --

THE COURT: Just answer the question.

THE WITNESS: All right.

14 BY MR. MILLER:

Q. And there were quite a few people in that area?

THE COURT: This is repetitious, Mr. Miller.

MR. MILLER: Yes, Your Honor.

THE WITNESS: Quite a few people gathered later.

BY MR. MILLER:

Q. Now, at the time you first saw this person in the company of police officers, had you previously talked to any police officer prior to going to where he was located at that time? A. No, I don't recall.

Q. Do you recall whether or not a police officer accompanied you to where this defendant was at the time you saw him? A. To where he was being held by the police?

Q. Yes. A. Yes.

Q. A police officer did accompany you? A. Yes.

Q. Do you recall a conversation between you and the police officer during the time that you were leaving wherever you were with him up until the time you first saw this defendant in the custody of the police? A. No, there was no particular conversation that I referred to except

15 that I was nervous and excited.

Did you give a description to this police officer, that is, the one who accompanied you, did you give a description to him of the person that assaulted you? A. I don't recall that I did.

Q. Did you know at that time the description? A. Did I know the description of the man?

Q. Yes. A. Well, I knew what he generally looked like and, as I say, I knew about the type of clothing he wore.

Q. Going back to the time that -- You recall when this person put his arms around your neck and you finally broke away? A. Yes.

Q. What description would you give to the Court and the jury at this time of that particular person, that is, with respect to his physical characteristics? A. Well, I guess he was probably a little bit taller than I, it seemed, and sort of medium to light colored skinned.

Q. Medium to light colored. A. That was my general impression. And, well, that is about all I can say. He wasn't heavy build, heavy set or anything.

16 Q. How tall are you, Miss Donnelly? A. I am about five feet six.

MR. MILLER: I have no further questions, Your Honor.

MR. CAPUTY: I have nothing further, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: Your next witness, Mr. Caputy.

MR. CAPUTY: Mr. Nelson, please.

Whereupon,

EDWARD NELSON

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name, sir? A. Edward Nelson.

Q. Where do you live, Mr. Nelson? A. 4905 Quarles Street, Northeast.

Q. Are you employed? A. I am employed.

Q. And where at? A. With Issac Mungin.

Q. Were you working for him or with him on December 22nd, 1962?

17 A. I was. We just got off.

Q. Do you, sir, today know a lady named Caroline V. Donnelly, a person by that name? A. I don't know her but I know of her.

MR. CAPUTY: Would you stand up, please.

(Individual stood in the courtroom.)

BY MR. CAPUTY:

Q. Do you know this lady by sight? A. I do.

Q. Do you know that her name is Caroline Donnelly? Do you know that? A. That's right.

Q. Now, directing your attention, sir, to December 22, 1962, did you see this person whom you have just identified in the courtroom, Caroline Donnelly? A. I did.

Q. Now, will you tell the Court and jury where, if anywhere, you saw her on December 22 and the time? A. I don't know exactly the time, but it was in the evening at Kenilworth Avenue and Eastern Avenue.

Q. Tell us about that. What, if anything, took place concerning the person whom you have just identified as Miss Donnelly? A. Well, we

18 had pulled up and was going in the store and this lady was over there hollering and screaming and all bloody, and this fellow grabbed something out of her hand and ran across the street on the Maryland side and went to the liquor store and came back on the District side.

Q. Now, when the lady was screaming and the fellow grabbed something out of her hand, was that on the District side? A. That was on the District side.

Q. Did there come a time, then, that you saw that person that

grabbed something out of Miss Donnelly's hand, did you see him after that? A. Did I see him afterwards?

Q. Yes. After something was taken from Miss Donnelly's hand, did you see him? A. Yes, he ran from the District side to the Maryland side.

Q. Did there come a time that you saw him later after that, after he ran away? A. After he was with the policeman.

Q. Did you see him in the company of the policeman? A. I did.

Q. All right. And the person in the company of the policeman, was that the person that struck Miss Donnelly and took something out of her
19 hand? A. That's right.

Q. Now, do you see that person here in the courtroom, the person whom you saw do that and who was in the company of the police later on? A. That's him (indicating).

Q. Which one? A. With the checkered shirt on.

MR. CAPUTY: May the record show, if Your Honor please, that the witness has identified the defendant Leeper?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. This that you saw took place in the District of Columbia here on this date, December 22, 1962? A. That is right.

MR. CAPUTY: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q. Mr. Nelson, did there come a time that you were confronted with the police officers with respect to this case? A. Did I do anything?

Q. Did you ever talk to the police officers about this case? A. No,
20 I haven't.

Q. Did you talk to them when you went over to where this person was, when he was in custody of the police? A. No, he just asked me did I see what happened and I told him.

Q. You told him then? A. Yes.

Q. Did you give him a full account of what you had seen? A. That

was all. I told him when we arrived on the scene, the woman was standing there bleeding and hollering and the man grabbed something out of her hand and ran across the street.

Q. Where were you when you first saw this? A. We were parked on the Maryland side and we came to the District side.

Q. Where were you? A. Eastern Avenue and Kenilworth.

Q. You were parked there or what? A. We had parked and were walking to the store.

Q. Were you in the District at that time? A. Yes.

Q. You were in the store? A. No, we hadn't gone into the store.

21 Q. Kenilworth Avenue divides Maryland and the District, is that right? A. Eastern Avenue divides the District and Maryland.

Q. Does Kenilworth Avenue run into Maryland? A. That's right, all the way through.

Q. And you were driving on Kenilworth Avenue? A. No, I wasn't.

Q. Well, you were riding in the car? A. Yes, I was riding in the truck.

Q. Was the truck proceeding from Maryland, coming back to Washington? A. No, we were coming out of the District going into the District.

Q. Coming out of the District going into the District. A. Coming off of Quarles Street, going into Kenilworth Avenue supermarket.

Q. Had you been in Maryland? A. No, we hadn't been in Maryland.

Q. I see. Were you coming back down toward town at the time you saw that? A. I was coming to Eastern Avenue and Kenilworth.

Q. Is that approaching town, the center part of Washington? A. No, that is the dividing line between Washington and Maryland.

22 Q. You were riding in a truck? A. Yes.

Q. The direction in which the truck was going, which way was that? A. Towards Kenilworth off of Eastern Avenue.

Q. You were sitting on the passenger's side, is that correct? A. Yes, I was sitting on the passenger's side. When we got out of the truck, we was going into the store on the District side.

Q. You were sitting on the passenger's side?

THE COURT: The witness said he got out of the truck and was going to the store, Mr. Miller.

MR. MILLER: I am sorry, Your Honor. I didn't hear him.

BY MR. MILLER:

Q. You were on the sidewalk when you first saw this? A. Yeah, we was going into the store.

Q. Where were you located? Were you in the truck, on the sidewalk or going into the store or inside the store? A. We had gotten out of the truck and we was going into the store when the woman was standing there hollering. We were on the District side then.

23 Q. Was she on the same side of the street you were on? A. She was on the same side.

Q. Was she more towards the Maryland side? A. She was in the District.

Q. I understand that. Was she more towards the Maryland line? A. Well, she was on Eastern Avenue. That's the Maryland line.

Q. You didn't understand my question. Kenilworth and Eastern Avenue run like this (indicating); is that right? A. Comes together.

Q. Is that right? A. That is right.

Q. You were on Kenilworth Avenue over here (indicating); is that right? A. We was on Eastern Avenue.

Q. You were on Eastern Avenue. A. That's right.

Q. That's over here (indicating)? A. Runs into Kenilworth.

Q. And where was she? A. She was on Eastern Avenue on the District side and Kenilworth.

24 Q. When you first saw this person that you say was taking money out of Miss Donnelly's hand, what did he have on? A. He had on a trench coat.

Q. What color. A. If I am not mistaken, it was brown.

Q. Brown. A. A brown trench coat.

Q. A brown trench coat. When you first saw him, how tall was he approximately? A. I would say 'round about five foot eleven.

Q. Five eleven. A. I said about.

Q. About five nine or five eleven?

THE COURT: The witness said about five eleven.

BY MR. MILLER:

Q. Now, you say that this person snatched the money out of Miss Donnelly's hand; is that correct? A. Yes.

Q. Then what did he do? A. He ran across the street on the Maryland side. He went into a Maryland liquor store.

Q. Did he go inside the liquor store? A. He went inside the store.

Q. What did you do at that time? A. I was standing there looking.

25 Q. Is this a shopping center over in the Maryland area? A. It's a Super Market.

Q. A Super Market. A. That's right.

Q. Now, where you say this person went into the store, is this a shopping center area? A. It's a liquor store.

Q. It's a liquor store. But is the liquor store located in a shopping center? A. No, it's two liquor stores together. That's all.

Q. Which one did he go into? A. He went into the liquor store, one's a tavern and one's a liquor store.

Q. One's a what? A. A tavern.

Q. He went into the liquor store? A. He went into the liquor store.

Q. And you stayed where you were? A. That's right.

Q. What did you do after you saw this person enter the liquor store? A. I stood and looked.

26 Q. How long did you stay there looking? A. Until it was all over. Until the officers come.

Q. Did you ever go into the grocery store? A. Sure.

Q. Before you saw this? A. No. When we got there, we heard this woman screaming and all blooded and we just stand there and look.

Q. After this person went into the liquor store, did you go into the grocery store? A. After they carried him away, we went into the store.

Q. I'm sorry, I can't understand you. A. After when the police

carried him away, we went into the store and did our shopping.

Q. And you did your shopping? A. That's right.

Q. Was there a crowd of people around at that time? A. There was quite a few, yes.

Q. Was there quite a few people around when you first noticed this person going into the liquor store? A. There was when we got there.

Q. When you got there? A. That's right.

Q. Do you know for a fact that the same person who went into the
27 liquor store was in fact the one that the police showed you later on? A. I don't quite understand you.

Q. You testified that someone went into the liquor store, is that correct? A. I say he went into the liquor store.

Q. I say, you testified that someone when into the liquor store. Would you please listen to my question.

You testified that someone went into the liquor store, is that correct?

THE COURT: The witness has testified about twelve times to this effect now, Mr. Miller.

MR. MILLER: I understand that, Your Honor, but I am trying to acquaint him. I can't seem to communicate with this witness. I am trying to do as best I can.

BY MR. MILLER:

Q. Now, did you see the person come out of the liquor store? A. That's right.

Q. You saw him come out. A. That's right.

Q. Do you know whether or not the person whom you saw come out of the liquor store was in fact the person that went in? A. Same one that went in.

28 Q. How do you know? A. I know how he was dressed. I was looking at him.

Q. How did you know at that time?

MR. CAPUTY: If Your Honor please, I object.

THE WITNESS: I told you, I seen him when he went in the store.

THE COURT: Just a minute.

Your objection is sustained.

BY MR. MILLER:

Q. Do you know how many people were in the liquor store? A. I wasn't in the liquor store. I was standing on the corner.

Q. So you don't know how many people were inside the liquor store? A. I was standing on the corner; I didn't go in the store.

Q. After this person came out of the liquor store, what happened? A. He came back over on the District side.

Q. Where did he go? A. He came back where it happened.

Q. He came back to the scene? A. Yeah, and the police met him
29 across the street.

Q. The police met him? A. That's true.

Q. Is this the same person that the police met (indicating the defendant)? A. That's the one.

Q. Was he by himself at the time you saw him? A. He was by hisself when he came across the street; that's right.

Q. When did you first talk to the police about this case? A. When I first talked to them, the officer asked me did I see anything happened and I told him I seen him when he snatched the money out of the lady's hand and run across the street.

Q. You told the police that? A. I told the police that.

Q. What else did you tell them? A. That was all.

Q. Did you ever say that this was the man that ran across the street? A. I told them that was the one that snatched the money and came back across the street.

Q. Did the police ask you if this was the man? A. Yes.

30 Q. They did. What did the police say to you with respect to whether or not this was the person? A. He asked me did I see it.

Q. Did the police officer point this fellow out to you? A. No, he didn't point him out.

Q. Did he ask you if this was the fellow? A. That's right.

Q. When was this? After this person came out of the liquor store

from across the street? A. When they arrived there on the scene; that's right.

Q. The police had him at the time when you saw him last? A. The police had him after they caught him coming across the street.

Q. Did you say, "There's the man"? A. Well, I told them he was the one that run across the street with the money.

THE COURT: I think this is repetitious now.

BY MR. MILLER:

Q. Did you ever come down town to give an account of what you saw and what you heard and what you discussed with the police at that time? A. This is the third time I've been here.

31 Q. Do you recall whether or not anyone wrote down the statements that you have testified to now? A. A lady did.

Q. She did? A. Yes.

Q. Did you read it over? A. No, I never read it. I didn't see it. She asked me questions.

Q. I'm sorry, I didn't hear you. A. She asked me questions and I haven't seen no papers.

Q. At that time, did she type it up? A. She typed it up.

Q. Did you read the typewritten statement? A. I didn't see it.

Q. What did she do with it? A. She kept it.

Q. You don't know what she typed down? A. No, I don't know what she wrote or what she typed down or nothing.

MR. MILLER: I have no further questions.

MR. CAPUTY: I have nothing further, Your Honor.

THE COURT: Step down.

(The witness left the stand.)

32 THE COURT: Call your next witness.

MR. CAPUTY: Mr. Jones, please.

Whereupon,

JOHN D. JONES

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name, sir? A. John D. Jones.

Q. And what is your business or occupation, sir? A. Correctional officer.

Q. And where at is this? A. National Training School for Boys.

Q. Now, other than that, do you have any other employment? A. Part-time cab driver.

Q. Now, directing your attention to December 22, 1962, were you working in your part-time job? A. That I was.

Q. About what time of the day was it that you were working at your part-time job? A. Well, it was in the evening.

Q. Do you today know a person named Caroline V. Donnelly?

33 Do you know a person by that name? A. Yes, I do.

Q. Had you known that person before December 22, 1962? A. No.

Q. Now, directing your attention to December 22, 1962, did you see that person whom you now know as Caroline Donnelly? A. I did.

Q. And do you see here in the courtroom this person whom you know as Caroline Donnelly? A. Yes.

Q. Would you point her out? A. The lady in the first pew, second row.

Q. Is this the lady? (Individual stood.) A. That is the lady.

MR. CAPUTY: May the record show, if Your Honor please, that this witness has identified the complaining witness Donnelly?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. Now, directing your attention to December 22, 1962, did you see this person whom you have just identified as Caroline Donnelly? Did you see her on December 22? A. Yes.

Q. Will you tell the Court and jury the circumstances around that

34 fact, the time that you saw her? A. I had just answered a radio call, picked up a passenger and was coming out Eastern Avenue, going east on Eastern Avenue. About a half a block or less, I saw a man cross the street and accost a woman. At that particular time, I thought

it was dander but I come to find out the man placed his arm around the lady's neck and in the scuffle both went down. The man jumped up and ran across the street, right across in front of my automobile and by that time, I was very close to him. As a matter of fact, I had to apply my brakes. He went through an alley on the Maryland side. I then went around the corner on Kenilworth Avenue, came back through a parking lot of the liquor store to see if I could see this person; and this person came in the opposite entrance -- not the opposite entrance, the exit entrance of this liquor store parking lot and I ran very close on this person at that time and I got a very good view of him, but I could not stop him. He ran around the corner and disappeared.

Q. Were you in the cab all this time? A. Yes, I was.

Q. Now, after that happened, then where if anywhere did you go? A. From there I went to Union Station.

Q. Now, did there come a time after you left Union Station that you went somewhere? A. I returned to No. 14 Precinct to report what I had seen.

Q. And at No. 14 Precinct, can you tell us whether or not you had seen anyone at No. 14 Precinct? A. Yes, I saw a person.

Q. About what time was it, first, that you had seen this happen? A. Approximately 4:40 -- between 4:35 and 4:40 in the evening.

Q. And about what time was it after you left Union Station that you had gone to No. 14 Precinct? A. I went back to No. 14 Precinct at approximately 5:15.

Q. Can you tell us, sir, whether you recognized anyone at No. 14 Precinct? A. I did.

Q. And whom did you recognize at No. 14 Precinct? A. The man that had ran through the back entrance of the liquor store parking lot. I recognized him there.

Q. At the time that you recognized him there, did you recognize him at that time as the man who had fallen down with the person whom you have just identified as Caroline Donnelly? A. That I did.

36 Q. All right. Now, do you see here in the courtroom the person whom you say you saw fall down with Caroline Donnelly and whom you saw later at No. 14 Precinct? Do you see that person here in the courtroom? A. Yes, sir.

Q. Will you point him out? A. The young man at the table there.

Q. Which one? A. With the plaid shirt.

MR. CAPUTY: May the record show, if Your Honor please, that the witness has identified the defendant Leeper?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. This that you have testified to took place here in the District of Columbia? A. Correct. In part now, because he was on the Maryland side. I saw him on the Maryland side.

Q. At the time that the woman went down. A. It was on the District side.

MR. CAPUTY: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q. Mr. Jones, when you first applied your brakes when this person

37 was going in front of your car, did you get a good description of him at that time? A. Very well.

Q. Very well? A. Yes.

Q. What did he have on? A. He had on a sort of military type, olive drab coat, something like that color.

Q. And what else did you notice about him? A. A black hat in his hand.

Q. A black hat? A. A black hat.

Q. What about his facial features? A. Well, his facial features, he was a young fellow. He had a little fuzz on the bottom of his chin and small fuzz on the upper lip -

Q. He had fuzz on the bottom of his chin? A. Yes, a little fuzz on his chin and on the upper lip. I got that close.

Q. Now, when you saw this person going into the back entrance of the liquor store, how were you able to ascertain that that was the same person you had seen when you had to apply your brakes on Eastern Avenue? A. Well, he ran across in front of me there and he was coming

38 at an angle from where the lady was on the street and towards me, therefore, I got a good view of him then and when I went around the corner and came through there, it was the same person coming through the lot.

Q. The same person that you say was going into the liquor store, did you notice whether or not he had any fuzz on his chin? A. I don't think I said he was going into the liquor store.

Q. You said the back entrance or exit of the liquor store.

THE COURT: The parking lot of the liquor store, the witness said.

MR. MILLER: I'm sorry.

BY MR. MILLER:

Q. Well, at that time, did you notice whether or not he had any fuzz under his chin? A. Oh, yes.

Q. How far were you from him at that time? A. Oh, I would say less than the distance between here and the radio there.

Q. Were you in your car at that time? A. I was.

Q. Were you moving your vehicle at that time? A. Yes.

39 Q. You were. A. Yes.

Q. Let me ask you this: Did this person have the black cap which you have testified to in his hand or on his head at that time? A. When he ran across the street, he took his hat off.

Q. Did you see him with the hat when you saw him in the parking lot of the liquor store? A. Now, this was rather fast action. I can't specifically state that I saw the hat in his hand in the parking lot.

Q. When you went to No. 14 Precinct -- How many times did you go there, incidentally, that evening? A. Once.

Q. Now, when you arrived at No. 14 Precinct, was this person there? A. Yes.

Q. He was. And you went there for the purpose of reporting what you had seen on Eastern Avenue? A. Right.

Q. When you first walked into No. 14 Precinct, what happened? A. Why, this young fellow was there --

Q. No, I am asking you what happened. A. What happened?

40 Q. Yes. A. Oh, I just walked right in the precinct and that was all.

Q. Did you tell anyone what your purpose of being at No. 14 was? A. Yes.

Q. Who did you tell that to? A. I mentioned to a plain-clothes man that is the fellow that accosted the woman on Eastern Avenue.

Q. That is what you said? A. Yes.

Q. What took place prior to the time you told the detective this was the person, as you say, that accosted the woman on Eastern Avenue? A. Why, I left Eastern Avenue and went to Union Station --

Q. No. I mean inside No. 14 Precinct. A. Inside of No. 14 Precinct: That was all that took place. The officer took information as to where I lived.

Q. When you first walked right in, did you report to the desk? A. No, I did not get that far.

Q. You didn't get there? A. I did not get there.

41 Q. Where was this defendant sitting at the time you walked into No. 14 Precinct? A. He wasn't sitting; he was standing.

Q. Well, from the door that you entered in relation to where he was, how much distance was there between the two of you? A. At least ten feet.

Q. And you had talked to the detective first before you noticed this person, or did you notice this person and talk to the detective simultaneously? A. That's right. I noticed the person first and I said that that was the fellow that had accosted the woman.

Q. Did you notice at this time whether this person that you saw in No. 14 Precinct had, as you say, fuzz on the chin? A. Will you say that again, please? I missed one phrase.

Q. Do you know whether or not at the time you arrived at No. 14 Precinct, whether or not this defendant presently sitting at this table had fuzz under his chin? A. Did I notice it before then?

Q. I am asking you whether or not you noticed it then at No. 14 Precinct. A. Yes. Yes, I did.

42 Q. You did. A. Sure.

MR. MILLER: I have no further questions.

MR. CAPUTY: Nothing further, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: We will take a short recess, Mr. Marshall.

You ladies and gentlemen of the jury should not discuss the facts in the case with anyone, not even your associates on the jury during the Court's recess.

(Whereupon, at 11:40 a.m. a recess was taken.)

THE COURT: You may call your next witness, Mr. Caputy.

MR. CAPUTY: Mr. Mungin, please.

Whereupon,

ISSAC W. MUNGIN

called as a witness on behlaf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name, sir, please? A. Issac Mungin.

THE COURT: Will you lean forward and talk into the microphone.

43 Go ahead.

BY MR. CAPUTY:

Q. Where do you live, Mr. Mungin? A. 4905 Quarles Street, Northeast.

Q. And what is your business or occupation? A. Well, junking and hauling.

Q. Can you tell us, sir, whether you know Edward Nelson? A. Yes, sir, I do.

Q. Is he working for you? A. Yes, sir.

Q. Was he working for you on December 22, 1962? A. Well, we was hauling together but we had finished working Saturday evening.

Q. All right. Do you today know a person named Caroline V. Donnelly? Do you know a person by that name now? A. I don't know her by name but I have seen her for a long time. I don't know her name.

Q. In the courtroom when the case was identified, did you see the lady that stood up, that answered to the name of Caroline Donnelly before you stood up today in court? A. Yes.

Q. Did you see her? A. That's the woman but I don't know her

44 name.

Q. All right. Now, directing your attention to December 22, 1962, did you see that person who stood up in court this morning in answer to the name of Caroline Donnelly? A. Yeah, I saw her.

Q. Now, will you tell the Court and jury what, if anything, happened when you saw that person Caroline Donnelly whom you saw in the

courtroom today, what happened when you saw her on December 22? A. Well, I was standing on the corner by the grocery store on Eastern Avenue and Kenilworth Avenue. I saw the woman running across the street and she was hollering for help. And then this man, he was beating her in her face. She had some money in her hand. I don't know how much money she had in her hand. But my leg was bad and I couldn't get over there fast enough to do nothing to help her out. She lay on the ground begging for help. She was bleeding through the nose and bleeding in the face, everywhere.

Q. And what happened after that? A. Well, after that, then the man went across to a whiskey store over there on the Maryland side. Whether he got any whiskey or not, I don't know; and then he come back over on the D. C. side again and the police come over there and the police picked him up.

Q. All right. Did you see that person then, when the police had him? A. Well, there was such a riffle there. They was fighting so much, I couldn't see. I was all crippled, I couldn't get down there where they were.

Q. Well, do you see here in the courtroom the person that was beating this woman before he went over to the liquor store? Do you see that person in the courtroom? A. I see him. The man sitting right over there (indicating).

Q. Which one? A. The short man over there with the stripped shirt on.

MR. CAPUTY: May the record show, if Your Honor please, that the witness has identified the defendant Leeper?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. Is that the man who beat the woman? A. He was beating the woman up.

MR. CAPUTY: That is all I have, Your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q. How do you pronounce your name, your last name? A.
46 M-u-n-g-i-n, Mungin.

Q. Mr. Mungin, when you first heard this lady scream and saw her running across the street, where was Mr. Nelson at that time? A. He was on the corner there, on the corner by the grocery store. We had just got out of the truck.

Q. Now, was she coming from the direction that the driver's side of your truck was facing? A. No -- see, we was heading up Eastern Avenue this way (indicating) on the corner, on the side. But where she come, she come from the alley back there behind the whiskey store. She lived back there on Kenilworth Avenue but she come out the alley, running coming across on the D. C. side over there.

Q. Now, when you first saw this person that you say was beating her, how far were Miss Donnelly and this person from you? A. Oh, it was right at the corner of the store. I don't guess it was more than eight, I don't imagine. It was right by the corner. She was trying to make it across the street over there when she fell, he knocked her down. She was trying to make it across the street.

Q. Now at that time, when you first saw this person beating this woman, do you recall what he had on? A. He had on a brown Army
47 coat or gabardine coat and a black hat.

Q. Is that a regular hat that people wear or is it a cap? A. Well, I imagine it's a hat anybody buy in the store.

Q. It was a regular hat? A. Yes.

Q. Now, do you recall what this person looked like in the face? A. Who is that?

Q. The person that you saw beating the woman up over there. A. Well, that's the man that was beating the woman up over there (indicating).

Q. Can you describe to the Court and the jury at this time exactly what the physical characteristics of this person was at that time? I

mean his facial features. Did he have any scars on his face? A. There was such a mix-up there, I didn't pay no attention. I didn't pay no attention to that at all. I was on my way to the grocery store when the woman hollered for help. That's what attracted my attention.

Q. So you couldn't tell -- A. If he has any scars on his face, I
48 couldn't tell. I wasn't watching that close.

Q. Now, did there come a time that the police officers asked you to point out someone in the crowd? A. Yeah, he asked me to point the man out.

Q. Let me ask you this: When the police officer asked you to point this man out, did the police officer have him in custody? A. No, they come up there. The grocery man called. They caught him coming up from Maryland to the D. C. side.

Q. When you pointed this person out, that is, the defendant, did the police officers have handcuffs on him or anything? A. No, they hadn't arrested him yet.

Q. Where was he at that time? A. He was coming back on Eastern Avenue from the Maryland whiskey store.

Q. Was he walking? A. Yes, he was walking.

Q. This is the last question I think I will have to ask you, Mr. Mungin: At that time when this person was walking across from the Maryland line coming back into the District, did you point out that person or did the police officer ask you if that was the person? A. What
49 you mean?

Q. When you saw the man coming back from Maryland, coming towards the District, did you point that person out as the one who hit Miss Donnelly? A. Yes, I did. Yes, I pointed out he was the man that beat the woman up.

Q. How did you know? A. Because I stood there and watched him all the time. He had this coat on and I was watching when he was going to come out.

Q. Did you ever lose sight of this person? A. No, I never lose sight of him.

Q. Did he go into the store? A. Yes.

Q. Well, you lost sight of him then, didn't you? A. No, I couldn't lose no sight of him. There is glass all around in the window and I looked in there and I seen him in there, and I was standing on the corner there.

Q. So you never lost sight of him? A. No, I couldn't lose sight of him.

Q. Did you talk to the police officers about this case after this person was in their custody? A. No, I ain't talk a thing about it. I didn't want to be bothered with it.

50 THE COURT: Now, just a minute. Just answer the questions.

MR. MILLER: I have no further questions.

MR. CAPUTY: No questions, Your Honor.

THE COURT: Step down.

(The witness left the stand.)

MR. CAPUTY: Officer Richards, please.

Whereupon,

LARRY L. RICHARDS

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment, please, sir. A. Private Larry L. Richards, 14th Precinct, Metropolitan Police Department, Washington, D.C.

Q. What was your assignment on December 22, 1962? A. Assigned to Scout 142 in No. 14 Precinct.

Q. What shift of duty? A. Four to twelve.

Q. Were you working with any other officer? A. Yes, sir, I was.

Q. With whom? A. Officer Jon C. Marden, assigned No. 14 Precinct.

51 Q. Now, during the course of your shift of duty on December 22,

1962, did you receive a report of a robbery? A. Yes, sir, I did.

Q. About what time was that? A. We received the run about 4:40 p.m., sir.

Q. And did you respond anywhere, sir? A. Yes, sir, we did.

Q. Where did you go? A. Kenilworth and Eastern, sir.

Q. And after you got there, did you talk to people there? A. Yes, sir, we did.

Q. And after you talked with people, did you place anyone under arrest? A. Yes, sir, I did.

Q. Do you see that person in the courtroom here, whom you placed under arrest? A. Yes, sir, I do.

Q. Point him out. A. Sitting right there (indicating).

Q. How is he dressed now? A. He has got a plaid jacket, it appears, right now.

MR. CAPUTY: May the record show, if Your Honor please, that the witness has identified the defendant Leeper?

52 THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. After you placed him under arrest, where if anywhere did you take him? A. I took him to the scout car and at that time, I called for some assistance to transport him to No. 14.

Q. Now, prior to the time that you took him to the scout car, did you take him anywhere else, sir? A. Yes, sir. I took him back to the original scene of the offense.

Q. And on that day, did you see a person named Caroline V. Donnelly? A. Yes, sir, I did.

Q. Do you see Caroline V. Donnelly here in the courtroom? A. Yes, sir, I do.

(Individual stood.)

Q. Is this the person? A. Yes, sir.

MR. CAPUTY: May the record show, if Your Honor please, that he has identified the complaining witness?

THE COURT: The record will so indicate.

BY MR. CAPUTY:

Q. At the time you saw Caroline V. Donnelly, what was her con-

53 dition? A. Physical condition, sir?

Q. Yes. A. She had blood all over her face and all over the front of her; her hands and her arms appeared to be cut although I couldn't see due to her condition.

Q. At the time that you saw Caroline V. Donnelly when you had the defendant in custody, was any identification made by Caroline V. Donnelly of this defendant? A. Yes, sir, there was.

Q. She identified him as what, sir? A. As the person who had assaulted her and taken the money from her.

Q. All right. Now, where if anywhere was the defendant taken after that? A. He was taken to No. 14 Precinct, sir.

Q. At No. 14th Precinct, did you see a person named John D. Jones? A. Yes, sir, I did.

Q. And at that time, sir, did you know John D. Jones before December 22, 1962? A. No, sir, I have never seen this man in my life.

Q. At No. 14 Precinct, what time was it that you saw John D. Jones? A. That, sir, I didn't make a record of it. I would judge

54 approximately 5 to 5:15 p.m.

Q. Was any identification made --

MR. MILLER: Your Honor, I object to that.

THE COURT: It is customary to permit counsel to complete the question before making an objection.

MR. MILLER: I am sorry. I thought he had completed it, Your Honor.

THE COURT: State your question to the witness.

BY MR. CAPUTY:

Q. Was any identification made at No. 14 Precinct by this person whom you know as John Jones?

THE COURT: Just a minute. Are you objecting to this question?

MR. MILLER: Yes, Your Honor.

THE COURT: State the ground for your objection.

MR. MILLER: Your Honor, this is hearsay testimony and I object to it on that ground.

THE COURT: The objection is overruled.

Answer the question.

THE WITNESS: Yes, sir, he did.

BY MR. CAPUTY:

Q. And of whom? A. Of Robert E. Leeper, sir.

55 Q. Will you tell us about it. How was that identification made? A. At the time, I hadn't seen Mr. Jones when he walked into the station. I observed him standing back of the three defendants which we were booking at the time. All three of them had their backs to him and in the process, they had turned around. They were giving us quite a bit of trouble at the book. And Mr. Jones, whom I didn't know him to be at the time, pointed this particular gentleman out as the one who struck Miss Donnelly and took the money.

Q. And when you say "this particular gentleman", whom do you mean? A. I don't understand what you mean, sir.

Q. When you say that Mr. Jones pointed at this particular gentleman as the one who took the money, whom do you mean? A. The defendant, sir.

MR. CAPUTY: That is all.

CROSS EXAMINATION

BY MR. MILLER:

Q. Private Richards, what is a form PD-163? A. I am not sure. That is either a statement of facts or a --

Q. You prepare a statement in the ordinary course of your in-

56 vestigation, do you not, a statement of facts? A. If that is the correct PD Number, yes, sir, I do.

Q. Did you fill out a PD-163 in this case? A. If that is it, sir. I am not sure of the number. We are not supposed to know the numbers. We just know the location and what they are for. I could identify the same from looking at one.

MR. MILLER: Your Honor, at this time I move for the production of PD Form 163.

THE COURT: You may have whatever form the officer filled out. Do you have the form with you?

THE WITNESS: Yes, sir, I do.

THE COURT: You may examine it. The witness has it.

(Document handed to counsel.)

BY MR. MILLER:

Q. Officer, I will ask you to read this over again and ask you to refresh your recollection with respect to whether or not that is the identical statement that you typed up immediately after you started making out your various reports? A. Do you wish me to answer that question now? Is it the same one?

Q. Yes. Is it the same one? A. This is it but I personally did
57 not type it up.

Q. You did not? A. No, sir, I didn't.

Q. Well, do you know whether or not the statement is included in that statement? A. Whose statement, sir?

Q. Is this an account of the conversation with Miss Donnelly, do you know, or her account of the incident that took place? A. At the time when we received this run, we were assigned to a scout car --

THE COURT: Just answer the question.

Repeat your question to the witness.

BY MR. MILLER:

Q. My question, Officer, is: Do you know whether or not statements made in that particular form 163 were statements made at the time of the incident which we are discussing today by Miss Donnelly? A. No, sir, I don't.

Q. You do not know that? A. No, sir.

Q. Do you know who in fact filled the statement out? A. I know who took the statement from Miss Donnelly; yes, sir.

58 Q. Was this statement taken in your presence? A. No, sir, not all of the statement.

Q. Was the first part or the latter part taken in your presence? A. It would be broken up, in the middle part, the front and the latter.

Q. Let me ask you this: Do you know the $5.00 that we are speaking of with respect to the robbery, where was this $5.00 found if in fact it was found? A. It was found on another defendant whom we had charged at the time with the same crime.

Q. Do you know this person's name? A. Yes, sir, I do.

Q. What is the person's name? A. Edward Anderson.

Q. Anderson. A. Yes, sir.

Q. Was this person, Edward Anderson, present at No. 14 Precinct when all of these other people came in? A. Who are you speaking of, all these other people?

Q. I am speaking specifically of Mr. Jones. A. Yes, sir, he was.

Q. And at that time, do you recall whether or not Mr. Jones pointed out Mr. Anderson as the one who assaulted Mrs. Donnelly? A.

59 He did not.

Q. He did not? A. No, sir.

Q. Now, I will ask you also whether or not at that time you found any blood stains on this defendant? A. No, sir, I didn't.

Q. I will ask you this question: Whether or not at that time you found any blood stains on Mr. Anderson? A. There were blood stains on Mr. Anderson; yes, sir.

Q. Let me ask you this question: Whether or not subsequent to that time some form of check was made or comparison was made with respect to the blood found on Anderson and the blood found on Mrs. Donnelly? A. You are asking me if there was such a comparison?

Q. Yes. A. We attemped to make such a check; yes, sir.

Q. And was your check successful? A. Negative, not enough blood to positively identify or the blood type was on there in such a state that it couldn't be identified.

Q. Now, you testified that you had a conversation with Mr. John Jones at No. 14 Precinct; is that correct? A. I did not say I had a

60 conversation with Mr. Jones.

Q. Well, did you in fact have a conversation with Mr. Jones? A. No, sir.

Q. Well, did you ever have a conversation with Mr. Jones? A. The only conversation we had at No. 14 was when he pointed out the defendant.

Q. Did you ask him any questions as to how he knew that this in fact was the person? A. At this time, no, sir.

Q. Did you ever ask Mr. Jones that question? A. After that time, yes, sir.

Q. What was his reply? A. He stated he saw the whole offense.

Q. Did he tell you there were two or three other persons present at the time this offense occurred? A. No, sir, he didn't.

Q. Did he tell you if in fact this person was the only one present? A. He did, sir.

Q. He did. A. Yes, sir.

61 Q. Now, going back to the time that you first arrived on the scene, when you first noticed this defendant, what was he doing? A. When I first noticed the defendant, he was on the opposite side of Eastern Avenue being held by a citizen in a struggle.

Q. By a citizen? A. Yes, when I first noticed him.

Q. And do you know this citizen's name? A. No, sir.

Q. Now, did there come a time that you arrested this person? A. Yes, sir.

Q. Did there come a time that this person in your presence was confronted with Miss Donnelly? A. Yes, sir.

Q. And at that time, was Miss Donnelly positive that this in fact was the person? A. She assured me she was.

Q. She had no reservations? A. No, sir.

Q. Did you ask her first whether or not this was the person that had robbed her? A. Yes, sir.

62 Q. And she replied what? A. "That's the man."

Q. That's the man. A. Yes, sir.

Q. What ever happened to Mr. Anderson?

MR. CAPUTY: I object to that, if Your Honor please. It doesn't make any difference what happened to Mr. Anderson. We are trying this defendant.

THE COURT: I don't see the materiality, Mr. Miller.

MR. MILLER: Your Honor, Officer Richards has testified that the $5.00 which is supposed to have been taken off Miss Donnelly's person was found on Mr. Anderson. The officer has also testified that possibly the blood that came from Miss Donnelly was found on Mr. Anderson. The money was not found on this defendant, nor was the blood stains. I would like to find out what in fact happened to Mr. Anderson.

THE COURT: I will overrule the objection.

Answer the question.

THE WITNESS: He was released.

MR. MILLER: I have no further questions.

REDIRECT EXAMINATION

BY MR. CAPUTY:

Q. Was he released because there was no identification of him as the person that committed this robbery? A. That is right, sir.

63 Q. Now, these blood stains that you say were on Anderson, you don't know how long they had been on his coat, do you? A. No, sir.

MR. CAPUTY: I have nothing further, Your Honor.

THE COURT: Do you have anything further?

MR. MILLER: No, Your Honor.

* * * * *

(AT THE BENCH:)

* * * * *

THE COURT: Do you rest your case?

MR. CAPUTY: The Government rests.

MR. MILLER: At this time, Your Honor, I would like to make a motion for a directed verdict of acquittal for these reasons: One, Miss Donnelly stated she was not able to give a positive identification at the time this altercation took place between her and the person who robbed

her of the person who robbed her. Two, she testified that when she
64 saw the person in custody of the police, she was told by the police officer, "Is this the man?" And by natural response, she said, "This is the man." Three, the money was found on Edward Anderson and blood stains were found on Anderson. It is reasonable to assume if this defendant had hit her, blood stains would have been found on him but the blood stains were found on Anderson.

THE COURT: The Court will deny the motion.

* * * * *

11 (IN OPEN COURT:)

Whereupon,

ROBERT E. LEEPER, JR.

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

BY MR. MILLER:

Q. Mr. Leeper, you will have to speak loud enough so the members of the jury and His Honor can hear you. A. Yes.

Q. Will you please state your full name? A. Robert Edward Leeper, Jr.

Q. And your address? A. 4236 Gault Place, Northeast.

Q. Now, how tall are you, Mr. Leeper? A. Five eight.

Q. Five feet, eight inches? A. That's right.

Q. Directing your attention to December 22, 1962, at say, approximately three o'clock inthe afternoon, what were you doing at that time? A. I was at my aunt's residence, 4236 Gault Place, Northeast.

Q. At what time did you leave there? A. I left at 3:30.

Q. Where did you go from there? A. I went to Kenilworth Avenue to a friend of mine --

Q. Will you slow down a little bit so that the reporter can report everything you say.

13 THE COURT: What is your answer to the last question?

THE WITNESS: I left at 3:30, going to Kenilworth Avenue to Miss Williams' house.

BY MR. MILLER:

Q. You say you were going to Miss Williams' house? A. I went to Miss Williams' house.

Q. Now, what time did you leave Miss Williams' house if in fact you did leave? A. Fifteen after four.

Q. Are you certain of that? A. Yes.

Q. Now, after leaving Miss Williams' house, where did you go? A. I went from Kenilworth Avenue to the other side of Kenilworth Avenue to the liquor store on the Maryland line.

Q. On the Maryland line. Now, did there come a time that you left this liquor store that you are speaking of? A. I left the liquor store when the officers came on the line and arrested me.

Q. Now, please relate to the members of the jury and His Honor exactly what happened after the police officers arrested you? A. I was going into the liquor store, which I had seven cents to get me a 5-cent fizz (sic) and I heard the announcement say, "Get that man."

14 Then I turned around. There were two men and one of them showed me his badge and told me he was a police officer.

Q. He showed you a badge? A. Yes.

Q. Was he a detective or a regular officer? A. He said he was a detective from the 14th Precinct.

Q. Go ahead. A. He said I was under arrest. He handcuffed me behind my back.

There was two liquor stores. I was at the second liquor store. As we come past the first liquor store, the man made an announcement to get the man -- made another announcement to get the men. There was three of them. Get those two men in the liquor store. And they got two other fellows which I didn't know and had never seen before, and carried from the Maryland line across to the District.

Q. What happened then? A. The man that was with the police went in the market. Then out came -- the lady's name, I am not familiar with -- the complainant.

Q. Was it the lady who testified today? A. Yes. She came out of

the market. The three of us was standing outside of the market. There was a big crowd there. The officer asked the lady could she identify

15 anyone in the crowd. The lady said she think it was me.

Q. You are talking about yourself? A. Yes.

Q. Go ahead. A. Later on, I was carried to the 14th Precinct.

Q. Let me stop you right there. At that time, do you recall whether or not Mr. Nelson, that is the one who has previously testified here, or Mr. Jones or Mr. Mungin was at the scene where you say Miss Donnelly pointed you out as possibly being the one who robbed her? Were they there? A. Will you please recall the names again, please?

Q. The people who testified prior to you, do you recall seeing any of those people there at that time? A. Only one.

Q. Which one was that? A. The last one who took the stand.

Q. Now, you say there was a crowd. A. Yes.

Q. Do you recall whether or not anyone in this crowd was dressed similarly to you? A. Yes, there was.

Q. Now, what did you have on at the time that this police officer arrested you? A. I had on a light Army trenchcoat.

16 Q. What color was it? A. Green.

Q. Green. What else did you have on? A. I had on a black hat.

Q. A black hat or cap? A. Hat.

Q. Now, would you mind standing up. A. (The witness stood momentarily.)

Q. Did you have the same shirt and trousers on at that time? A. Yes, I did.

Q. After you went to No. 14 Precinct, what happened? A. I went to No. 14 Precinct and the complainant was talking with two or three policemen. Then later on, one of the police came to me and took my hat off and they asked the lady could she identify the one, and she pointed to me.

Q. Now, let me ask you this: Do you recall the police officer, that is Private Richards -- You heard his testimony. He testified, as you recall, that a person by the name of Anderson had blood on him

at that time. A. Yes, he did.

Q. Did you have any blood on you at that time? A. No, I didn't.

17 Q. How much money, approximately, did you have on your person at the time you went down to No. 14 Precinct? A. I had seven cents.

Q. How much money did you have on you when you were arrested over at Eastern and Kenilworth Avenue? A. I had seven cents.

Q. Did there ever come a time when the police officers found any money on you other than the seven cents you told us about? A. No, they didn't.

Q. Do you recall the person by the name of Mr. Jones who testified here today, the one with the galsses on? A. No, I had never seen him before.

Q. No. I said, Do you recall him taking the stand? A. Do I recall?

Q. Did you see him at No. 14 Precinct? A. No, I did not.

Q. Did you ever have a conversation with Miss Donnelly? A. No, I did not.

Q. Did the police officers ever have a conversation with her in your presence at No. 14 Precinct? A. Yes, they did.

Q. Do you recall what that conversation was about, Mr. Leeper?

18 A. No, I do not.

MR. MILLER: I have no further questions.

THE COURT: I believe we will defer the cross-examination until after lunch.

You, ladies and gentlemen of the jury, should not discuss the facts in this case with anyone during the luncheon recess.

(Whereupon, at 12:28 p.m., the trial in the above-entitled matter was recessed until 1:45 p.m. the same day.)

19 Whereupon,

ROBERT LEEPER, JR.

the witness on the stand at adjournment, resumed the witness stand, was examined and testified as follows:

THE COURT: You may proceed, Mr. Caputy.

CROSS EXAMINATION

BY MR. CAPUTY:

Q. There is no doubt about it that you were apprehended by the police on December 22, 1962, right there at Kenilworth and Eastern Avenue, right about there; right?

You were taken in custody by the police on that day, December 22, 1962? A. I was taken in custody by the police on December 22nd.

Q. Yes. And how did you say you were dressed on this day? A. How I was dressed on that day? I had a green coat on.

Q. Did you have a black hat? A. Yes, I did.

Q. Well now, there is no doubt, too, that at the precinct -- You did go to No. 14 Precinct station after you were arrested; is that correct? You were taken there, weren't you? A. Yes, sir, I was.

20 Q. Did you go by wagon? A. Yes, it was by wagon.

Q. All right. And at No. 14 Precinct station, as you testified, that happened, the woman pointed at you and said that you were the one that robbed her; is that correct? A. At the time that I was arrested, she said she think that I was the one.

Q. Didn't you testify this morning that at the 14th Precinct, there were the three of you there and that she pointed at you and said that you were the one who robbed her? A. She did.

Q. All right. She did point you out, didn't she? Is that correct? A. Yes.

Q. Well, now, as a matter of fact, you were taken to the scene and she identified you at the scene as the person who had robbed her, didn't she? A. She said she think I was the one.

Q. Now, at No. 14 Precinct, weren't you identified by Mr. Jones and didn't he say, "That's the person that accosted the lady on the street", or words to that effect? A. No, he didn't. He wasn't there.

Q. Well, now, at the time that you were at that vicinity, you saw

21 a cab driver or a cab around there, didn't you? A. No, I did not.

Q. Well now, there is no doubt about it that you were in that liquor store, weren't you? A. I didn't get a chance to go into the liquor store.

Q. You were not in the liquor store at all? A. No, I wasn't.

Q. As far as you know, you had never seen Mr. Mungin and Mr. Nelson prior to December 22, 1962; is that correct? A. I seen Mr. Mungin when he came with the police officer who arrested me and pointed me out.

Q. Yes. And he pointed you out too, didn't he? A. Yes, he did.

Q. And so did Mr. Nelson point you out too, didn't he? A. No, he did not.

Q. Now, you are the same Edward Leeper who, in the District of Columbia on the 17th of December 1960, was convicted of carrying a dangerous weapon, weren't you? A. Yes, I was.

Q. And you are the same Edward Leeper who, in the District of Columbia on June 20, 1961, was convicted of assault? A. Yes, I was.

MR. CAPUTY: I have nothing further, Your Honor.

22 THE COURT: Is there any redirect?

MR. MILLER: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q. Mr. Leeper, during the time that you were first confronted with the police officers and also down at No. 14 Precinct, did either one of these people that Mr. Caputy was asking you questions about, Miss Donnelly, Mr. Nelson, Mr. Richards or Mr. Jones, say anything in your presence about the clothing that you had on? A. They wasn't at the 14th Precinct.

Q. They weren't. Well, when you were at Kenilworth and Eastern Avenue and you were in company of the police officers, at that time did either one of these persons say anything about the clothing that you had on to the police officers? A. No, they did not.

MR. MILLER: I have no further questions, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: Do you have any further testimony?

MR. MILLER: No, Your Honor. May we approach the Bench?

23 THE COURT: Is there any rebuttal testimony?

MR. CAPUTY: No rebuttal, Your Honor.

THE COURT: You may come to the Bench.

(AT THE BENCH:)

MR. MILLER: Your Honor, at this time, I would like to renew my motion for a directed verdict of acquittal for the same reasons I have already mentioned.

THE COURT: Is there anything more you want to say in support of your motion?

MR. MILLER: Yes, Your Honor. With respect to the defense, the defendant has testified as to circumstances involved with respect to who he was with and where he was on that particular day. The testimony is not inconsistent with that of the Government's with the exception of the fact that he has testified he has no knowledge of anyone being robbed in the vicinity of Kenilworth and Eastern Avenue at that particular time when he was there.

And along with the other grounds that I have mentioned as to why I think a directed verdict of acquittal should be granted, I would also add that one: The lack of knowledge of the defendant of anyone being involved in a robbery.

THE COURT: I think the testimony creates a factual issue that must be decided by the jury. The Court will deny the motion.

24 Does the Government request any special charge, Mr. Caputy?

MR. CAPUTY: No, Your Honor.

THE COURT: Does the defendant request any special charge?

MR. MILLER: No, Your Honor.

* * * * *

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

BY MR. CAPUTY

MR. CAPUTY: May it please the Court, ladies and gentlemen of the jury: Factually, members of the jury, this is a very simple case and a just determination under the evidence should not be too difficult.

We presented for your consideration in support of this charge of

robbery against this defendant, the complaining witness who said that
25 on this particular day, December 22, 1962, she had left her residence and was going to the mailbox and then was going to go to the store.

Her testimony was that she was carrying some envelopes in her hand, cards I believe she labeled it, and also had some money in her hand; that as she walked by, she was accosted by this defendant and he yoked her, according to her testimony, and that she got away -- either that he let her alone or that she succeeded in getting away from him, she wasn't too sure. She said she ran and was running in the direction of the mailbox. And you recall her testimony that he ran after her and got her near that mailbox on the District side; that he struck her and knocked her down, and the money was taken. That was her testimony.

Then we presented also for your consideration the first witness, I believe, Mr. Nelson. He said that he was working with Mr. Mungin and he told you that he had seen this defendant whom he identified here in the courtroom, strike the woman and knock her down and snatched the money or whatever it was that was taken. He said that he had seen this individual -- I believe on cross-examination -- snatch the money, as he put it.

Then we presented for your consideration also Mr. Mungin who told you what he had seen. His testimony was that he had seen this defendant assault the woman and that he had always kept his eyes on this defendant from the time that he left there until the time that he was in
26 the liquor store.

Then we presented also for your consideration a Mr. Jones who told you that he had a fare and was going towards the Union Station; that he had seen this defendant assault the complaining witness. Both of them, his testimony was, had fallen; that he proceeded in his car and kept this individual in sight; that he had gone to the Union Station and upon returning from the Union Station, he went to No. 14 Precinct. Then his testimony was that as soon as he went in there, he said, "That's the man that accosted the woman on the street."

We presented the police officer who told you that after the defendant was arrested, the complaining witness identified him.

You have the identification of this defendant in the courtroom by the complaining witness, and you have the identification also by Mr. Nelson, Mr. Mungin and Mr. Jones as the individual who had assaulted and robbed the complaining witness being this individual.

And under this evidence, we ask you for a verdict of guilty.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. MILLER

MR. MILLER: May it please the Court, ladies and gentlemen of
27 the jury, on voir dire examination I asked you whether or not you had certain reservations about some of the Constitutional safeguards of this defendant, which he is given in a criminal case. I realize that possibly all of you have heard these various phrases before but in each criminal case, they must be emphasized because in each criminal case, they take on a certain amount of importance. And in this criminal case, as in any other criminal case that you might have sat on while you have been sitting as jurors this month, the importance should not be minimized, that is, the importance of the presumption of innocence and that of the other Constitutional safeguards which we speak of as the burden which the Government has of proving its case beyond a reasonable doubt.

The Government has brought forth several witnesses in order to establish possibly that beyond a reasonable doubt this person in fact is the one who committed this robbery.

Let's take a look at the evidence only momentarily to see what the Government is relying on to establish this person's guilt.

Now, you may be able to pinpoint the importance of this case, that is in terms of establishing the guilt or innocence of this defendant, by taking the testimony of the various witnesses and needling it down, if you can, to the point where you reach an identification problem. In this case,
28 it definitely is a matter of identification.

Each one of the witnesses who came forward for the Government, who testified on behalf of the Government, testified unequivocally that

in fact this was the person who robbed Mrs. Donnelly. There was no hesitation on any of their parts to identify this person as the one who robbed Mrs. Donnelly.

But then on cross-examination of the police officer, that is Officer Richards, it was brought out that Mrs. Donnelly was bleeding somewhat profusely from her fact at the time that she was hit and at the time that he first saw her. It was further brought out that, at the time the officer was cross-examined, at the time these three individuals who supposedly robbed Mrs. Donnelly were down at No. 14 Precinct, blood was not found on the defendant -- that is, this person sitting here -- but blood in fact was found on Mr. Anderson. Now, this is a fact that we can't overlook.

The police officer testified from the stand also that at the time he took these three persons down to the 14th Precinct, not this defendant but Mr. Anderson is the one who had the $5.00 on him.

Now, in all of the testimony of the other witnesses, they exclude anything pertaining to these other two individuals as being involved in the crime.

29 Why is it, ladies and gentlemen, blood was found on Mr. Anderson and not on the defendant?

Now, let's go back to what is a reasonable doubt. Do you feel within your mind that because no money was found on this particular defendant, no blood was found on this particular defendant, when if in fact he was close to Mrs. Donnelly as everybody is contending that he was, do you feel that some blood wouldn't in fact have been on his clothing somewhere? Do you feel that the Government would have brought this clothing in to the courtroom today in order to establish the fact that the blood was on his clothing and not on Mr. Anderson?

Now, where is Mr. Anderson? He is not in this courtroom, but he is the one who had the blood on him.

Now, there is a problem of identification, as I have said. Maybe this is why they released Mr. Anderson and held this person, because these individuals were so sure that in fact this was the one who robbed Mrs. Donnelly.

But, ladies and gentlemen of the jury, I would like to ask you a question: How many times in your ordinary course of business in your relationship with the community, with other individuals, have you mistaken an individual that someone before you or even behind you was someone that you possibly knew before? How many times have you gone up to someone, possibly, and tapped him on the shoulder thinking
30 that he was someone else when in fact the person turned around and in fact it wasn't the friend that you thought it was?

Identification is a very difficult thing to try to eliminate in a criminal trial because most people come into a courtroom and are positive in their identification, positive. But what often happens in a case like this: a witness is confronted by the police officer and the first thing that the police officer will say to that person is, "This is the man that robbed that person, is it not?" And by natural reaction, this person will rely, "Yes, that's the person."

Now, when did they first get the description of this person? Was it at the time that she was robbed or was it at the time that they were confronted with the police officer in the company of the defendant?

How many of you if you walked up to a police officer and you saw the police officer holding a person by the arm and this police officer would say to you, "Is this the person who robbed that lady?" Would you immediately reply, "Yes" and at that time would you also be able to give a very good description of the clothing this person has on, his facial features, and what have you?

Mrs. Donnelly testified that when she was assaulted by the person behind her, she said that the person was light complexioned, she thought.
31 Look at this defendant. Is he light complexioned?

She said that he was taller than she was. Is this defendant taller than Mrs. Donnelly?

She had a better view of her assailant than anyone that the Government brought forth but yet she feels that she was not positive of her identification because she was not certain, and that is the important thing.

Ladies and gentlemen of the jury, one thing I would like to emphasize in a criminal case is this: If you agree to speculate amongst yourselves as to whether or not this is the person who robbed Mrs. Donnelly, you are in fact violating your duty as jurors. You are in fact violating your oaths as jurors. When you took the oath to sit on this particular case, you agreed not to speculate as to the guilt or innocence of anyone; you agreed to either find this person guilty beyond a reasonable doubt -- And if in fact there is a doubt in your mind, you should resolve this doubt in favor of the defendant. This is what you agreed to do when you placed your hand on the Bible and took the oath.

Now, the other individuals who testified for the Government came forward with a positive identification. Mr. Jones, for instance, he said that this person darted across in front of his car and he had to put on his brakes. Now, do you feel within yourself that if you had an opportu-
32 nity to observe someone as Mr. Jones said he observed him that you would really be able to have an idea as to what that person looked like when he dodged in front of your car? That is, you are going down the street and without knowing it, someone dashes in front of your car and you apply the brakes, do you feel that at that time you would have any reason to observe this person so closely as Mr. Jones did at that time?

The defendant does not deny that he was at the liquor store. That is where Mr. Jones really got his identification and not from this individual crossing in front of Mr. Jones' car.

Why is it that they didn't find the money on this defendant when they took him down to the 14th Precinct if in fact, as the Government witnesses would have you believe, he was not out of sight from the time that he supposedly assaulted Mrs. Donnelly until the time that the police officer arrested him? What did he do with the money? No one lost sight of him but yet, still no money is found on him.

Some testified that the defendant was down on top of Mrs. Donnelly. Wouldn't that be enough, ladies and gentlemen of the jury, to get blood on your clothing if you get down on a person and snatch money out of their hands?

Now, when you retire to deliberate, don't close your eyes to the
33 possibility that people can be mistaken with respect to identification. It is so easy to mistake someone that you think and you believe is in fact the person that you think they are, when in fact they are not.

And if you would want to convict a man solely because probably these people knew that this was the man, no mistake whatsoever, then I think that you have chosen the right course. But if you can honestly say that this person in fact was not the one that robbed this man because there was no blood found on his person, there was no money found on his person, then I think your verdict, ladies and gentlemen of the jury, can be nothing other than not guilty because of the fact that you have a reasonable doubt.

Thank you very much.

FINAL ARGUMENT ON BEHALF OF THE GOVERNMENT

BY MR. CAPUTY

MR. CAPUTY: If Your Honor please, members of the jury, this is not a case where an incident has happened and that the perpetrator of the alleged incident is not seen for a day or two days or a week or a month later; this is a situation, members of the jury, where something has happened and within minutes the person that committed this particular offense is apprehended and identification is made.

There was no need here, members of the jury, to give out any
34 description of anyone because the call was sent out that a robbery was committed and immediately this defendant was apprehended.

Now this defendant himself, members of the jury, corroborates the complaining witness when the complaining witness said that he is the individual that robbed her. This defendant said that at the precinct station, the complaining witness identified him.

And this defendant too, if you recall, on cross-examination said that on the scene an identification of him was made by the complaining witness but not as emphatic, if you recall, as was made by her at No. 14 Precinct.

Now, members of the jury, at no time did this complaining witness who was assaulted by this individual -- at no time did she say to you that there were three individuals who committed this offense. In fact you have the testimony of the other people: You have the testimony of Jones. You have the testimony of Nelson. You have the testimony of Mungin. And those individuals who were not assaulted and who were not confused and who were not in it in any way, members of the jury, or distracted by what was happening to them, those individuals who saw what they saw at no time said that there was more than one individual who had robbed this complaining witness.

35 They identified the complaining witness as a victim of what had happened to her at that street corner and they identified this defendant as the individual who committed this offense.

You have the testimony, members of the jury, of Mungin who said, "At all times after I had seen this robbery committed, this individual was under my observation. I never lost sight of him." That was his testimony.

And you have the testimony, too, in the same vein by the other witness, Mr. Nelson, who was with Mr. Mungin. And then you have the positive identification, if you recall, members of the jury, of that cab driver. He had a passenger in the car and he said he did the best that he could to try to block this individual who had committed this robbery. He too witnessed it. At no time, members of the jury, did he say that there was more than one. When he witnessed what he saw and when he realized that there was not much that he could do with the cab, he went out to Union Station and, as a good citizen, members of the jury -- you heard his testimony -- he said that he went to No. 14 Precinct. He went to No. 14 Precinct to report what he had seen.

Members of the jury, there is no testimony here that he had known of the existence of Mungin or Nelson. He went to report what he had seen. And what was his testimony? His testimony was that as soon as

36 he went into that precinct, there were three individuals there in that precinct and he identified this individual; and that was corroborated

by the testimony of Officer Richards. He said, "That's the individual" immediately when he had seen him at the precinct. "That's the individual that accosted the woman on the street."

That is our case, members of the jury. If you feel that this evidence is speculatory evidence, then acquit this individual. But you will never find a case that is more like viewing what has happened at a moving picture theater, and under this evidence, we ask you to return a verdict of guilty as charged.

Thank you.

* * * * *

64 CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, as I am confident you know, at this point in the trial of every case, the Court is required to instruct you as to the law that will govern you in reaching your verdict in the case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

65 When the Court charges a jury in any case, the Court's position at that time is that the Court is virtually infallible, because what the Court says is the law must be accepted by the jury as being the law.

I am inclined to emphasize this point to juries because of an experience that I had several years ago when I hurried from the courthouse during the luncheon recess to rush up town to see the doctor that attends me. I stepped into a taxicab and the cab driver looked back at me and said, "I know you." I was quite pleased to be recognized and I said, "You do?" He said, "Yes, you are either Judge McGarraghy or Judge Keech. I have seen you in the courthouse." I was complimented to be mistaken for such distinguished judges, and the cab driver then explained to me that he had served on a jury here some months before. He said that in the course of his experience, he was on a jury that deliberated for three or four days. I queried why it took so long to reach a verdict in the case and he said, "Well, when we went back into the jury room to deliberate, one of the ladies on the jury said that the Judge is wrong

when he defines a certain legal term which he quoted in the manner that he does." He said, "We talked about it for three or four hours and this lady kept insisting the Judge was wrong. So we went back into the court-
66 room and asked the Judge to redefine that term, and he redefined it just the way he did the first time. When we went back to the jury room, the lady said she did not care what the Judge said, the Judge was wrong in this definition and so the jury reached an impasse because the lady's view of the law was different from that given to the jury by the Court."

This, of course, is not the function of jurors, to pass upon matters of law. You are the judges of the facts. Actually, as I am sure you appreciate by now, in all of our jury trials, we have really two judges or two groups of judges: The Court judges questions of law; and the jury is the judge of the facts in the case.

Remember in the course of your deliberations that the closing arguments made to you by Mr. Caputy and Mr. Miller are not evidence in the case. Each of these attorneys as an advocate is trying to portray the evidence in the case in the light that is most favorable to the client that he represents. The closing arguments of the attorneys are not evidence in the case, nor are the attorneys' recollections of the evidence binding upon you. It is your recollection of the evidence in the case which must guide you in reaching your verdict in the case.

Of course, when you go into the jury room, you will take with you
67 a copy of the indictment which has been returned by the Grand Jury in the case. An indictment is a rather forceful looking document but actually, for your purposes, an indictment is not evidence of anything. This indictment of this defendant is not proof of any fact whatsoever. The only purpose of the indictment is to inform the defendant of the charge which has been preferred against him, the charge which he must answer in open court.

Remember, then, that this indictment is not proof of any fact. In other words, that it is not entitled to any probative value in your deliberations.

This indictment charges the crime of robbery. The indictment says specifically that on or about December 22, 1962, within the District of Columbia, Robert E. Leeper, Jr. -- that is, this defendant -- by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Caroline V. Donnelly, property of Caroline V. Donnelly, of the value of about $5.00 consisting of $5.00 in money.

The indictment follows virtually the phraseology of the definition of the crime of robbery in the Penal Code of the District of Columbia where robbery is defined as follows:

68 Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or by snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of the crime of robbery.

There are, then, three essential ingredients to constitute the crime of robbery: first -- and this first element may take any one of three different forms -- either the use of force or violence, or the use of means whereby the aggrieved person is put in fear, or by a sudden taking or snatching. The second element is a taking from the person or immediate actual possession of another any money or other personal property. And the third element, of course, is the intent to rob or steal.

The law is that this defendant is presumed to be innocent. As a practical and realistic matter, what does this mean? This means simply that the defendant is not required to prove his innocence. There is a legal presumption of his innocence, which presumption continues until and unless the Government proves to your satisfaction beyond a reasonable doubt that the defendant committed the elements of the crime with which he is charged.

Therefore, unless the Government maintains its burden of proof and proves to your satisfaction beyond a reasonable doubt that this defen-

69 dant committed all of the elements of the offense with which he is charged, then you, the jury, must find the defendant not guilty.

The burden of proof upon the Government, however, is to prove the defendant not guilty beyond a reasonable doubt but not beyond all doubt whatsoever. In other words, the Government must prove the defendant guilty to a moral certainty but not to an absolute or a mathematical certainty. As its name readily suggests, a reasonable doubt is a doubt which is predicated upon reason, that is, a doubt for which you can give a reason to yourselves.

In determining whether the Government has established the charge against this defendant, you must consider and weigh the testimony of all of the witnesses who have appeared before you. This means both the witnesses called by the Government and the testimony offered by the defendant.

You are the sole judges of the credibility of the witnesses. In other words, you must determine which witnesses to believe and to what extent to believe them.

In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to consider the demeanor of the witness on the witness stand, his or her manner of
70 testifying, whether the witness impresses you as having an accurate memory of the facts about which the witness is testifying, whether the witness displays any favor or prejudice towards the Government or towards the defendant, whether the witness has any interest in the outcome of the case. But most particularly, the factor you have to determine is basically this: Does the witness impress you as being a truth-telling individual?

If you believe that any witness willfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

The District of Columbia Code provides that no person shall be incompetent to testify in either civil or criminal proceedings by reason

of his having been convicted of a crime, but such fact may be given in evidence to affect his credit as a witness.

You will recall that this defendant on cross-examination admitted a conviction in 1960 for the crime of carrying a deadly weapon and in 1961 for the crime of assault. The meaning of this District of Columbia
71 Code provision is that these admissions of prior convictions must not be considered by you as being any evidence whatsoever that this defendant committed the present offense. You may consider these prior convictions only insofar as in your minds they affect the credit of the defendant as a witness in the present case.

The Court further instructs you that while the law makes this defendant a competent witness in his own behalf, you have the right to take into consideration his situation, his interest in the result of your verdict and all of the circumstances which surround him, and you should give to his testimony such weight as you believe it is fairly entitled to receive.

I repeat, it is the Court's responsibility to define the law to you; it is your responsibility to accept the law as it is defined by the Court.

I repeat also that you are the sole, the exclusive judges of the facts.

The Court cautions you not to permit your judgment, your reason or your intelligence to be swayed by any prejudice, by any bias, by any ill will or by any sympathy. Your verdict should be reached in accordance with the solemn oath you took that you would well and truly try this case
72 and a true verdict render in accordance with the evidence and in accordance with the law as it is outlined to you by the Court.

Your verdict must be a unanimous one. In other words, all twelve of you must concur in your verdict.

Will counsel come to the Bench.

(AT THE BENCH:)

THE COURT: Does the Government request any further charge, Mr. Caputy?

MR. CAPUTY: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. CAPUTY: None whatsoever, Your Honor.

THE COURT: Mr. Miller, do you request any further charge?

MR. MILLER: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. MILLER: No, Your Honor.

THE COURT: Very well.

* * * * *

[Filed February 21, 1963]

VERDICT

On this 21st day of February, 1963, came the attorney of the United States; the defendant in proper person and by his attorney Paul Miller, Esquire; whereupon the jurors of the regular Petit Jury panel, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

* * * * *

who are sworn to well and truly try the issue joined herein; whereupon, the Court directs the calling of one additional person to serve as alternate juror, and Marian A. Powell, being called, is sworn to well and truly try the issue joined herein; whereupon, after hearing of the evidence and instruction of the Court, the alternate juror is discharged and the jury retires to consider their verdict.

The jury returns into Court and, upon their oath, say that the defendant is Guilty. The case is referred to the Probation Officer of the Court, and the defendant is remanded to the District of Columbia Jail.

By direction of
EDWARD A. TAMM
Presiding Judge
Criminal Court # 3

* * * * * *

[Filed March 25, 1963]

JUDGMENT AND COMMITMENT

On this 22nd day of March, 1963, came the attorney for the government and the defendant appeared in person and by counsel, Paul E. Miller, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and verdict of Guilty of the offense of Robbery as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to Fifteen (15) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ EDWARD A. TAMM
United States District Judge.

[Filed March 28, 1963]

NOTICE OF APPEAL

[Hand Written]

Robert Edward Leeper, Jr.

District of Columbia Jail

Violation Title 22 - Section 2901 (Robbery) D.C. Code

An Appeal from the judgment of the order entered by this Court March 22, 1963.

District of Columbia Jail

I the above named petitioner hereby Appeal to the United States Court of Appeals for the District of Columbia Circuit from the above stated judgment.

/s/ Robert Edward Leeper, Jr.
Petitioner Pro Se

Subscribed and sworn to before me this 26 day of March 1963.

/s/ James
Notary Public

THIEL & CASILLAS
209 C Street, N.W.
Washington 1, D.C.

Telephone 393-0625, 393-7217

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,034

ROBERT E. LEEPER, JR.,
Appellant

v.

UNITED STATES,
Appellee

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF ROBBERY ENTERED BY THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SELMA M. LEVINE
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the conviction of robbery must be reversed and a new trial ordered for failure to give an instruction on identification, when the defense of mistaken identification had credible support in the record in view of (a) appellant's steadfast denial he was involved; (b) unexplained circumstances implicating another man; (c) the weak character of much of the Government's testimony.

2. Whether prejudicial error was committed in overruling an objection to the admission of a police officer's testimony as to an extra-judicial identification of appellant by another witness, when that testimony may have concluded the issue of guilt in the jury's mind and thus created a risk of an unjust verdict.

3. Whether, in view of the unexplained circumstances implicating another man, and the unconvincing character of the Government's identification testimony, the conviction must be reversed because there was insufficient evidence to enable the jury to find guilt beyond a reasonable doubt.

INDEX

Authorities Cited

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,034

ROBERT E. LEEPER, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF ROBBERY ENTERED BY THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of robbery entered on March 22, 1963 by the United States District Court for the District of Columbia (J.A. 57), based upon a jury verdict of guilty returned on February 21, 1963 (J.A. 56). On March 28, 1963, appellant filed a Notice of Appeal (J.A. 58) and applied for leave to appeal without prepayment of costs. This application was denied by the District Court on April 4, 1963. Appellant's appplication to this Court for leave to appeal without prepayment of costs was granted on July 29, 1963.

The District Court had jurisdiction under D. C. Code, Sec. 11-306 (1961). This Court has jurisdiction under 28 U. S. C. 1291.

STATEMENT OF THE CASE

Appellant was indicted for robbery on January 21, 1962 under 22 D. C. Code, Sec. 2901 (1961) (J.A. 1). The indictment charged:

> On or about December 22, 1962, within the District of Columbia, Robert E. Leeper, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Caroline V. Donnelly, property of Caroline V. Donnelly, of the value of about $5.00, consisting of $5.00 in money.

After a one-day trial before a jury on February 21, 1963, appellant was found guilty (J.A. 56). The Court (Tamm, J.) thereafter sentenced appellant to imprisonment for a term of not less than five nor more than fifteen years (J.A. 56-57).

The complaining witness, Miss Caroline V. Donnelly, and three men who stated they saw the attack, described, on behalf of the prosecution, the manner in which the offense occurred.

The Complaining Witness. Miss Donnelly related that on December 22, 1962, she left her residence at 1807 Kenilworth Avenue in Maryland, about 4:30 p.m., to go to the mailbox at Kenilworth and Eastern Avenues, N. E. in the District of Columbia (J.A. 4). Eastern Avenue is the dividing line between Maryland and the District of Columbia. In her hand, she had a five dollar bill, a note, and two Christmas cards (J.A. 4). As she approached Eastern Avenue, she passed three Negro men (J.A. 4, 7). Subsequently, one of them grabbed her around the neck and stood in back of her, holding her (J.A. 4, 7). She managed to extricate herself and ran across Eastern Avenue to the District of Columbia side (J.A. 4). She was followed across the street by the culprit who caught up to her, hit her on the nose, and caused her to fall to the ground (J.A. 4-5). As she got up, he grabbed for the money and cards she held in her hand (J.A. 5). Miss Donnelly was bleeding quite a bit as a result of the attack (J.A. 5, 11).

According to Miss Donnelly, she identified appellant "within about ten minutes" after the offense (J.A. 5). The identification took place in front of the grocery store where the offense occurred, on the District of Columbia side of Eastern Avenue (J.A. 30). At the time of the identification, appellant was in the hands of Police Officer Richards who arrested appellant on the Maryland side of Eastern Avenue and brought him across the street (J.A. 5, 18, 30, 31, 38). Appellant was the only one in hand at the time (J.A. 8-9, 31), and the police officer said to Miss Donnelly, "Is this the man?" or "This is the man," or something to that effect (J.A. 8-9). She was "nervous and excited" at the time (J.A. 10).

Miss Donnelly never gave the police a description of appellant (J.A. 10). On the stand, her only description was her statement that she thought appellant, at the time of the initial attack, had "some kind of raincoat or trenchcoat on," but she was uncertain of the color (J.A. 7). On cross examination, she stated that when appellant was in the presence of the officer, she recognized him by his clothes and "his general appearance, but mostly by his clothes," (J.A. 8). She agreed that because he had on a raincoat, she "assumed" he was the person (J.A. 8). She conceded her description would fit quite a few people (J.A. 8). Miss Donnelly had no opportunity to see or get a good look at the culprit or his two companions when she passed them because "everything happened so fast and I was so frightened." (J.A. 7-8).

Witnesses Mungin and Nelson. Isaac Mungin, in the junking and hauling business, testified that he had alighted from his truck with his helper, Edward Nelson, and was standing on the corner near the grocery store on Eastern and Kenilworth Avenues, N. E., when he "saw a woman running across the street," "hollering for help" and a man "beating her in her face"(J.A. 26).

He claimed he saw the culprit run across to a whiskey store on the Maryland side and then come back to the District of Columbia side again (J.A. 26). Nelson testified that "a fellow grabbed something" out of Miss Donnelly's hand, "ran across the street on the Maryland side and went to the liquor store and came back on the District side." (J.A. 11, 13). Nelson and Mungin identified appellant as the culprit to the police when appellant was in the company of the arresting officer (J.A. 28, 12). Neither provided a specific description, other than that appellant wore a brown trench or Army coat and a hat (J.A. 14, 27).

Witness Jones. John D. Jones, a part-time cab driver and a correctional officer at the National Training School for Boys, testified that he was driving his cab going east on Eastern Avenue on December 22, 1962 about 4:35 or 4:40 p.m., when he saw a man cross the street, accost a woman, place his arm around her neck (J.A. 19).

Both "went down" in the scuffle (J.A. 20). According to Jones, the man jumped up, ran across the street "in front of my automobile," and went through an alley on the Maryland side (J.A. 20). Jones also stated that he went around the corner on Kenilworth Avenue, came back through a parking lot of the liquor store, and "this person came in ... the exit entrance of the liquor store parking lot." (J.A. 20).

Jones did not make an on-the-spot identification, but instead, one-half hour later, went to the precinct station where he stated he recognized appellant as the person who had fallen down with Miss Donnelly (J.A. 20, 22). There was no line-up at the precinct station.

Police Officer Larry Richards was the officer who arrested appellant and the other two Negro men at 4:40 p.m. on December 22 (J.A. 30, 34). He testified that, when he had appellant in custody where the offense occurred, he

asked Miss Donnelly whether this was the man who had robbed her and she replied "That's the man." (J.A. 31, 35). He was allowed, over objection, to corroborate the Jones identification of appellant at the precinct (J.A. 31-32).

The Defense. Appellant, the only witness for the defense, testified he did not commit the act charged. [1/] He related that he left his aunt's residence in Northeast Washington at 3:30 p.m. on December 22, 1962, visited a friend on the area shortly thereafter, and left at 4:15 p.m. (J.A. 37-38). At about 4:45 p.m., he was about to go into a liquor store on the Maryland side of Kenilworth Avenue across the street from the site of the offense, to buy a 5 cent "fish", when he suddenly heard a voice saying "Get that man," and was then apprehended by the police (J.A. 38). Shortly thereafter the police arrested two other men, including one Edward Anderson, in or near the next door liquor store (J.A. 38, 34). [2/]

At the time of the arrest, appellant had only seven cents with him (J.A. 38). The five-dollar bill was found on Anderson, who was charged at the same time with the same crime (J.A. 34). Officer Richards found no blood stains whatever on appellant (J.A. 34), though the complaining witness was bleeding "quite a lot," and she and the culprit "went down" together (J.A. 20, 21). There were blood stains on Anderson (J.A. 34).

1/ Appellant steadfastly maintained his innocence. He made no admissions whatever at any time, including the lengthy period from his arrest at 4:45 p.m. on December 22 until his preliminary hearing before the Court of General Sessions sometime on December 24, 1962.

2/ On the Northeast Corner of Kenilworth and Eastern Avenues, there are two liquor stores immediately adjacent to each other, both facing Kenilworth Avenue. It appears that appellant was arrested in front of the store farthest from the corner, and the other two men in the store at the corner (J.A. 38).

Anderson was released because, according to Richards, there was no identification of him as the robber (J.A. 36). Richards testified that Witness Jones had failed to identify Anderson at the precinct station, though Anderson was present (J.A. 34). The officer also stated that a check of the blood found on Anderson and Miss Donnelly was "negative, not enough to positively identify or the blood type was on there in such a state that it couldn't be identified." (J.A. 34). No explanation appears in the record as to the release of the third man.

Motions for Acquittal and Charge. Appellant's Motions for judgment of acquittal (1) at the close of the Government's case and (2) at the close of the entire case, both based on the insufficiency of the evidence, were denied (J.A. 37, 43).

The Court's (Tamm, J.) charge to the jury outlined the three elements in the crime of robbery which must be proved beyond a reasonable doubt (J.A. 53). The Court added that "unless the Government maintains its burden of proof and proves to your satisfaction beyond a reasonable doubt that this defendant committed all the elements of the offense with which he is charged," they must find appellant not guilty (J.A. 53). The Court did not point out that there was a conflict in the identification testimony, nor did it tell the jury that if the circumstances of identification were not convincing, they should acquit.

The jury brought in a verdict of guilty of robbery on February 21, 1963 (J.A. 56). On March 22, 1963, the Court entered a judgment committing appellant to a term of imprisonment for a period of five to fifteen years (J.A. 57). Appellant's timely Application to Proceed on Appeal in forma pauperis was denied by the District Court on April 4, 1963 and allowed by this Court on July 29, 1963.

STATUTE INVOLVED

22 D. C. Code, Sec. 2901 (1961). Robbery.

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months mor more than fifteen years.

STATEMENT OF POINTS

1. The Court plainly erred in failing to give an instruction on identification.

2. The Court committed prejudicial error in permitting a police officer to testify to an extra-judicial identification by another witness.

3. The Court erred in denying appellant's Motion for Judgment of Acquittal because the evidence with respect to identification was insufficient to enable the jury to find appellant guilty beyond a reasonable doubt.

SUMMARY OF ARGUMENT

I

There was more than credible support in the record for the defense of mistaken identification which would entitle a defendant to an instruction on identification. First, appellant consistently maintained his innocence and explained his presence in the area of the offense. Second, there were damaging circumstances which pointed the finger of guilt at another man, namely, his possession of the fruits of the crime, a $5 bill, at the time of his arrest immediately after the offense, and the presence of blood stains on his clothing. The Government offered no satisfactory explanation of either circumstance, and neither a $5 bill nor blood stains were found on appellant, though the prosecution's testimony was that he "went down" with the complaining witness who was bleeding.

Third, there were inherent weaknesses in the identification testimony presented by the Government. That of the complaining witness, in particular, was almost worthless. Her identification of appellant after the offense was untrustworthy since it was induced by the fact that he was handcuffed and alone in the custody of a police officer, and prompted by the question "Is this the man?". She was moreover in a highly emotional state -- "nervous," "excited" and "frightened". She was vague in her description on the stand, claiming recognition only because of what appellant "generally looked like" and his trench coat, a description she admitted would fit quite a few people. By her own admission, she never got a good look at the culprit because everything happened to quickly. Some of the same defects made the testimony of other so-called eye witnesses unreliable.

In these circumstances, the Court's instructions which referred only to proof beyond a reasonable doubt of the three elements of robbery did not provide adequate guidance to the jury. The jury was never told that there was a conflict in the identification evidence which it must resolve, and that if the circumstances of identification were not convincing, they should acquit. McKenzie v. United States, 75 U. S. App. D. C. 270, 126 F.2d 533 (1942). The unexplained circumstances implicating Anderson were certainly important enough to be called to the attention of the jury.

Though no request for an identification instruction was made, failure to give it was plain error, Rule 52(b), F. R. Crim. P., and the conviction should be reversed and the case remanded for a new trial. The issue of identification was crucial and close, and a particularized instruction was essential to enable the jury to deal with it.

II

John Jones, a part-time cab driver, who claimed he saw the offense as it occurred, testified that he identified appellant as the culprit in the precinct station about one-half hour after the offense. Though Jones' credibility was not attacked or impeached in anyway, the Court permitted the arresting police officer, Richards, over objection, to corroborate the fact that Jones made an identification in the precinct, to describe the manner in which identification was made, and to repeat Jones' declaration that appellant was the culprit. The Court offered no explanation of its ruling.

Richards' testimony was incompetent as hearsay because it was offered to prove not only the fact of a prior extra-judicial identification but also to prove the truth of that identification naming appellant as the culprit. It violated the rule against corroborating the statements of unimpeached witnesses because of the undue influence they will have on the jury.

In the circumstances of this case, admission of the policeman's testimony was prejudicial and constituted reversible error because it must have concluded the issue of guilt in the jury's mind. The Jones precinct identification of appellant was important, because Anderson was released when Jones identified appellant, not Anderson, at the precinct. Any doubts the jury may have had because of the suspicious circumstances initially pointing to Anderson could have been relieved by the Jones testimony as to his precinct identification, and completely dispelled by the Richards' reinforcement of Jones' testimony. The prejudicial effect was compounded by the prosecutor's reference to the Richards corroboration in closing argument.

This Court's decision in Baber v. United States, No. 17,348, decided June 27, 1963, does not in any way preclude reversal for the erroneous admission here. It is distinguishable on its facts. And, in addition, the Court recognized that admission of hearsay testimony which was cumulative would warrant reversal where it created, as it did here, a "significant risk of an unjust or irrational verdict."

Even if the Richards testimony were admissible only for the limited purpose of confirming the statement that Jones made a prior identification, a cautionary instruction was essential to so inform the jury. Otherwise the jury was bound to take the testimony as proof of the accuracy of the Jones identification. Failure to give such an instruction was plain error.

III

There was insufficient evidence to enable the jury to determine beyond a reasonable doubt that appellant was the robber, and accordingly the conviction should be reversed with directions to enter a judgment of acquittal.

Appellant's innocence was consistently maintained. He never confessed or made any admissions. The Government never satisfactorily accounted for the possession by another man arrested simultaneously of the fruits of the crime immediately after its commission, and the presence of blood stains on his clothing. Such an account was essential to dispel the doubt about appellant's guilt raised by these circumstances pointing to the other man.

Nor did the identification testimony provide any more clear and convincing evidence of appellant's guilt. Defective perception and suggestion inhered in it. Moreover, the witnesses' descriptions of appellant were vague, and rested primarily on a commonly worn article of clothing. Appellant was never identified in a line-up. Upon all the evidence, a reasonable mind must have had a reasonable doubt of guilt.

ARGUMENT

I. The Conviction Must be Reversed, and a New Trial Ordered, for Failure to Give an Instruction on Identification Where (a) Appellant Consistently Maintained His Innocence; (b) There were Unexplained Circumstances Implicating Another Man; (c) Much of the Government's Identification Testimony was Weak and Unreliable.

In a criminal case, "the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." Tatum v. United States, 88 U. S. App. D. C. 386, 391, 190 F.2d 612, 617 (1951). Failure to give such an instruction in the circumstances of this case, though no request was made, constituted plain error affecting appellant's substantial rights.

The defense here rested on mistaken identification. That defense had credible support in the record. Appellant, testifying on his own behalf, maintained his innocence on the stand. He accounted for his presence in the area by stating that, after a visit to his aunt nearby, he was about to go into a liquor store across the street from the site of the offense to buy a 5 cent "fish" when the police arrested him (J.A. 37-38). Appellant never confessed or made any admissions.

The adequacy of appellant's testimony, for purposes of instruction, is underscored when it is viewed in light of the arrest of the other two Negro men who were found on the scene, and the circumstances particularly implicating one of them, Edward Anderson.

The fruit of the crime, the five dollar bill alleged to have been snatched from the complaining witness, was not found in appellant's possession (J.A. 34). This was so although the arrest occurred "within about ten minutes" of the attack (J.A. 5), and there is nothing in the testimony of those claiming to have watched appellant continually to suggest he disposed of it (J.A. 11-18, 25-29). Such a bill was found in the possession of Anderson, who was charged at the same time with the same crime (J.A. 34).

Moreover, there were no blood stains whatever on appellant (J.A. 34), though it was clear the complaining witness was bleeding "quite a bit" (J.A. 5, 11) and that she and the culprit "went down" together (J.A. 20). There were blood stains on Anderson (J.A. 34).

The suspicious circumstances pointing to Anderson were never satisfactorily explained or accounted for by the Government. No reason appears in this record for Anderson's possession of the $5 bill immediately after commission of the offense. Ordinarily, such possession would justify the inference that the possession was guilty possession, and, unless accounted for in some way consistent with innocence, might be of controlling weight in establishing guilt of the possessor. Wilson v. United States, 162 U. S. 613, 619 (1896); Edwards v. United States, 78 U. S. App. D. C. 226, 139 F.2d 365, 368-69 (1944) cert. denied, 321 U. S. 769.

In addition, the Government never offered competent proof to explain the presence of blood stains on Anderson. See Wilson v. United States, 162 U. S. 613, 620 (1896). All that appears is the testimony of a Police Officer, who stated that "some form of check" of the blood found on Anderson and on Miss Donnelly was made and it was

> "Negative, not enough blood to positively identify or the blood type was on there in such a state that it couldn't be identified." (J.A. 34).

A comparative analysis of blood stains is surely a matter for expert testimony. See People v. Smith, 142 Cal.App. 2d 287, 298 P.2d 540, 543 (1956). There was no showing Police Officer Richards so qualified. His testimony was obviously based on some kind of laboratory report. This was not introduced into evidence, nor the analyst produced.

The unconvincing character of much of the identification testimony presented by the Government also lends credence to appellant's defense for purposes of an instruction. The value and trustworthiness of a witness' testimony as to his own prior identification of an accused is obviously dependent upon a showing that the circumstances are reasonably free of improper influences and preclude any reasonable suspicion of unfairness or unreliability. Colbert v. Commonwealth, 306 S. W. 2d 825, 828(Ky. Ct. App. 1957). In the case of the complaining witness, upon whose testimony the Government heavily relied, defective perception and suggestion were such as to make her identification of appellant almost worthless.

Her identification took place in front of the grocery store where the offense occurred, on the District of Columbia side of Eastern Avenue, and about ten minutes thereafter (J.A. 30). At the time of the identification, appellant was handcuffed and in the custody of Police Officer Richards, who arrested appellant on the Maryland side of Eastern Avenue and brought him across the street (J.A. 5,8,30,31,38). Appellant was the only one in hand

at the time (J.A. 8-9, 31). [3/] The risk of false suggestion in this procedure, particularly to a "nervous", "excited" and "frightened" woman who had just been physically attacked (J.A. 10), was enhanced by the police officer saying to her, "Is this the man?" or "This is the man," or something to that effect (J.A. 8,9,35). Bringing one person before a victim and asking whether the victim can identify him is "calculated to induce a fancied recognition." Colbert v. Commonwealth, 306 S. W. 2d 825, 828 (Ky. Ct. App. 1957); see also Baker v. State, 236 Ind. 55, 138 N.E. 2d 641, 646 (1956); Wigmore on Evidence, Sec. 786a, p. 164 (3d Ed. 1940).

The reliability of her identification is suspect because she was in a highly emotional state. She had just been beaten, she was bleeding and she was, by her own admission, "nervous and excited" and "frightened" (J.A. 7, 10). As a consequence, and because everything happened so quickly, she conceded she had no clear notion of the appearance of her attacker (J.A. 7). She never gave the police a description (J.A. 10).

Her only description on the stand was vague. She thought appellant, at the time of the initial attack, had "some kind of raincoat or trenchcoat on," but she was uncertain of the color (J.A. 7). When appellant was in the presence of the officer, she claimed she recognized him by his clothes and "his general appearance, but mostly by his clothes." (J.A. 8). From his coat, she "assumed" appellant was the person (J.A. 8) though she agreed her description would fit quite a few people (J.A. 8). When asked if the police

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3/ Though the police apparently arrested Anderson and one other at the time of appellant's arrest, it is clear that the initial approach to Miss Donnelly was only with appellant (J.A. 9, 31). The two others were not brought up to her until after she had made her identification of appellant (J.A. 8-9).

officer said "Is this [appellant] the man?", her response was tentative: "And I said 'I believe so,' or words similar to that. As I said, I was so frightened ..." (J.A. 9).

Her identification is incapable of belief. Miss Donnelly conceded she had no real opportunity to see or get a good look at the culprit or his two companions when she passed them because "everything happened so fast and I was so frightened" (J.A. 7,9).

> "A. Well, the one who grabbed me had some kind of a raincoat or trench coat on.
>
> Q. What color was it?
>
> A. Well, I am a little -- I mean, everything happened so fast and I was so frightened. It was either a brownish green or brown. I mean, I am just not sure about the color but it was some kind of a trench coat.
>
> Q. Do you recall what the other two gentlemen were wearing?
>
> A. I think one had a dark coat on of some kind but, as I said, it was all -- I didn't notice them until all of a sudden and the whole thing was so quick and I was so frightened that I didn't really get a good look at any of them." (J.A. 7).

She avoided looking at them and, as a result, was not able to determine anything about their clothing or appearance (J.A. 8). Nor did subsequent events give her an opportunity to get a good look at the culprit. The initial attack occurred after she passed the three men, and came from the back (J.A. 4,5,7). When she ran across the street, the culprit ran after her, hit her, and grabbed her money (J.A. 5). It is impossible, therefore, to credit her statement on cross that when appellant was in the presence of the officer, she recognized him by his clothes and "his general appearance" (J.A. 8).

Similar defects of vagueness, imperfect perception, and suggestion infected the testimony of witnesses Mungin and Nelson who claimed that, while standing in front of the grocery store, they observed the beating, watched the culprit cross Eastern Avenue to the Maryland side, go into the liquor store directly across the street, and then come out (J.A. 15,26). Though the woman was "hollering," and at least ten minutes elapsed before the arrest, both Mungin and Nelson just stood there, making no move to chase or apprehend the culprit (J.A. 15, 26). Neither provided any description of appellant's facial or physical characteristics. As justifying their identification, they referred only to the fact that appellant wore a brown trench or Army coat and a hat (J.A. 14, 27). [4] Mungin admitted that because he was crippled, he could not get down to where the fighting was, "couldn't see" when the fighting was going on (J.A. 26) and "didn't pay no attention"to appellant's facial characteristics because"there was such a mix-up there." (J.A. 27,28).

The reliability of their identification, moreover, is suspect because both were made when appellant was in custody of the police (J.A. 12, 28). [5] In Nelson's case, in addition, identification was prompted by a police question whether appellant was the culprit (J.A. 17).

Considerable doubt is cast upon Jones' powers of perception by the fact that it was "rather fast action," his car was moving when he saw the culprit,

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4/ Jones testified it was olive drab (J.A. 21). Nelson claimed the culprit was 5' 11" (J.A. 14). Appellant is 5' 8" (J.A. 37).

5/ Though the record is not entirely clear on this point, Mungin's testimony that appellant was not in police custody at the time he came across the street from Maryland to the District is directly contrary to Nelson's testimony (J.A. 12) and to the police officer's testimony that he took appellant back to the "original scene of the offense" after the arrest (J.A. 30).

and the culprit was running at the time (J. A. 20,22). Moreover, Jones claimed that he then saw the culprit go through an alley on the Maryland side, enter the "exit entrance of this liquor store parking lot" and then run around the corner and disappear (J. A. 20,22). He denied appellant was going into the liquor store (J.A. 22). This claim is inconsistent with Mungin's statement that he never lost sight of appellant, and appellant went nowhere but into the liquor store (J.A. 26,28).

In view of the unexplained circumstances implicating Anderson, appellant's unshaken testimony of innocence, and the weaknesses in the Government's identification evidence, there was more than adequate foundation in the evidence for the defense of mistaken identification.

In the particular circumstances of this case, the general instructions which the court gave did not adequately guide the jury in its task of weighing the evidence. The Court told the jury that there were three elements in the crime of robbery which must be proved beyond a reasonable doubt: (1) the use of force or violence or means whereby the aggrieved person is put in fear or a sudden taking or snatching; (2) a taking of money from the possession of another and (3) intent (J.A. 53). The Court added that "unless the Government maintains its burden of proof and proves to your satisfaction beyond a reasonable doubt that this defendant committed all the elements of the offense with which he is charged," they must find the defendant not guilty (J.A. 53).

But the Court did not in its instructions call to the attention of the jury the fact that upon the evidence here there was a question of identification which it must resolve, and that its task was to decide whether the

evidence disclosed beyond a reasonable doubt that appellant or some other person in fact committed the robbery. The Court did not outline the evidence bearing on identification and point out the conflict or the weaknesses therein. The judge did not tell the jury, for example, that the direct testimony which, if believed, appeared to tie appellant to the crime must be weighed against appellant's denial he was implicated and the other circumstances pointing to Anderson, circumstances never satisfactorily explained by the Government. The Court did not, in fact, allude at all to the defense case. The failure to tell the jury "in plain words that if the circumstances of identification were not convincing, they should acquit, was error." McKenzie v. United States, 75 U. S. App. D. C. 270, 273, 126 F.2d 533, 536 (1942).

Here, as in McKenzie v. United States, supra, appellant never confessed nor made any admissions. On the contrary, he steadfastly denied he was involved. Here, as in McKenzie, the money appellant was alleged to have stolen was not found in his possession. It was, on the contrary, found in the possession of Anderson who was arrested at the same time. Moreover, though it was clear that the complaining witness was bleeding seriously and that appellant "fell down" with her, a situation in which it is logical to assume that at least some of the blood would have been transferred to appellant, no blood stains were found on him. Even if, as in McKenzie, "these circumstances ... lack much of making out a complete defense ... [T]hey were, however, important enough to be called to the attention of the jury, to be weighed with the evidence in support of the legal presumption of innocence." 75 U. S. App. D. C. at 273, 126 F.2d at 536.

While no request for an identification instruction was made at trial, omission of such an instruction was plain error affecting the substantial rights of the appellant which this Court should notice under Rule 52(b), F. R. Crim. P. This Court has recognized that such an omission may warrant reversal where it concerns a "crucial issue either of law or fact of a sort with which the jury cannot properly deal without a particularized instruction from the court." (Emphasis added). Willis v. United States, 106 U. S. App. D. C. 211, 213, 271 F.2d 477, 479, cert. denied, 362 U. S. 964 (1959), quoting Obery v. United States, 95 U. S. App. D. C. 28, 217 F.2d 860, cert. denied 349 U. S. 923 (1955); Tatum v. United States, 88 U. S. App. D. C. 386, 190 F.2d 612 (1951). On the evidence presented, the issue of identification was clearly "crucial" and a particularized instruction was essential to enable the jury to deal with the issue.

By referring only to the three Hornbook elements constituting the crime of robbery and by ignoring the conflict in the identification testimony, the charge could well have implied to the jury that it could ignore the conflict, and could not reasonably doubt defendant's guilt, if the only three elements the Court mentioned were established beyond a reasonable doubt. This defect was not overcome when the Court instructed the jury it must find that "this defendant" committed all the elements of robbery (J.A. 53). That direction was not in context sufficiently precise, for it did not clearly point out the need to determine whether the evidence was sufficiently compelling to identify appellant, instead of someone else, as the robber. It did not, moreover, delineate the evidence bearing upon the issue.

Since the jury was not made aware that a resolution of the conflict in the identification testimony was significant in this case and crucial

to conviction, and since it may have found defendant guilty despite a reasonable doubt on this issue, the prejudicial nature of the omission of adequate instruction on identification is patent. For this reason, the case should be reversed and remanded for a new trial.

II. The Court Committed Prejudicial Error in Permitting a Police Officer to Testify, Over Objection, to an Extra-Judicial Identification of Appellant by Another Witness, Where that Testimony, by Concluding the Issue of Appellant's Guilt in the Mind of the Jury, Created a Risk of an Unjust Verdict.

John Jones, a part-time cab driver, testified that he saw the offense as it occurred about 4:40 p.m. on December 22, 1962 (J. A. 19-20). He claimed he got a good and close look at the culprit after the scuffle as he ran across the street in front of his cab and thereafter at the "exit entrance" of a liquor store parking lot (J.A. 20). Jones did not make an on-the-spot identification, nor did he make any immediate contact with the police (J.A. 20). He testified that he went to the 14th Precinct at about 5:15 p.m., where he "recognized" the man "that had run through the back entrance of the liquor store parking lot," and recognized him "as the man who had fallen down" with the complaining witness (J.A. 20-21). He then identified appellant in the courtroom (J.A. 21).

Police Officer Larry Richards testified that he saw Jones at the 14th Precinct about 5 or 5:15 p.m. on December 22, 1962. He was then asked:

> "Was any identification made at No. 14 Precinct by this person whom you know as John Jones?" (J.A. 31)

Over appellant's objection this was hearsay, Richards was permitted to answer "yes", to describe the manner in which the identification was made,

and to repeat Jones' declaration that appellant was the culprit (J.A. 32):

> "A. At the time, I hadn't seen Mr. Jones when he walked into the station. I observed him standing back of the three defendants which we were booking at the time. All three of them had their backs to him and in the process, they had turned around ... And Mr. Jones, whom I didn't know him to be at the time, pointed this particular gentleman [appellant] out as the one who struck Miss Donnelly and took the money." (J.A. 32)

This testimony of Officer Richards to an extra-judicial identification made by a crucial witness, when the identity of the accused was a central issue, was incompetent, and, in the circumstances of this case, was highly prejudicial. It was hearsay because it was a reproduction by the policeman of out of court statements made by Jones as proof not only that Jones had made a prior identification of appellant as the robber in the precinct station, but also that appellant was in fact the culprit. See Colbert v. Commonwealth, 306 S.W. 2d 825,828 (Ky. Ct. App. 1957).

It was, in addition, an improper attempt to corroborate Jones' version of the prior identification when the fact of Jones' identification in the precinct had not been disputed, nor his identification attacked. "The general rule is that a witness may not be corroborated or have his sworn testimony reinforced by proof that on previous occasions he has made the same statements as those made in his testimony." Mellon v. United States, 170 F.2d 583, 585-86 (5th Cir. 1948); IV Wigmore, Evidence, Sec. 1124 (3d Ed. 1940); accord, Baber v. United States, D. C. Cir., No. 17,348, decided June 27, 1963. The reason

for the rule is that, absent impeachment, corroboration has no probative value and yet undue weight prejudicial to the defendant will be attributed to it by the jury.

The prejudicial effect of the erroneous admission of Richards' testimony here requires reversal, and nothing in this Court's decision in Baber v. United States, D. C. Cir. No. 17,348, decided June 27, 1963, speaks against it. In Baber, this Court recognized the "widely accepted rule against the admission of prior consistent statements of unimpeached witnesses." Slip Opinion, p. 7. But it declined to reverse a criminal conviction on the ground that the District Court improperly admitted, as spontaneous declarations, hearsay statements of the complaining witness, made 25 minutes after the attack to police officers, and used to support the testimony of the complaining witness whose credibility was in issue. In this Court's view, admissibility of the hearsay statements as spontaneous declarations was a close question, but it felt that no reversible error was committed in any event because the declarations had a cumulative effect there which presented "no significant risk of an unjust or irrational verdict." Slip Opinion, p. 8.

This case differs from Baber in significant respects. Here, unlike Baber, the credibility of the witness whose declaration was offered is not directly involved, since Jones had not been impeached when Richards' corroboration of Jones' testimony was offered. No need for the testimony was shown. Whereas in Baber, the other testimony of the Government on identification was "strong and ample," here the other testimony was weak, unconvincing and left unresolved doubts. See Argument, Point I, above. Moreover, in Baber, the police officer's

testimony was cumulative of properly admitted evidence presented not only by the complaining witness but also by her father. Here Richards' testimony was the only one in corroboration of Jones, and, in the particular circumstances, the effect was bound to be damaging.

The Jones identification of appellant was important. Though the finger of suspicion pointed at Anderson, the police released Anderson in part because Jones identified appellant, not Anderson, at the precinct station though Anderson was present (J.A. 32,34). According to the objected to testimony, though Jones himself did not so state, Jones was the only one of the prosecution witnesses who was ever faced with more than one choice of possible culprits (J.A. 32). Whatever suspicion the jury might have had about Anderson, and whatever unresolved doubt it had about appellant, could have been relieved by Jones' testimony as to his precinct identification, and further dissipated by Richards' reinforcement of the Jones testimony. In addition, the significant impact of the Richards testimony was underscored by the prosecuting attorney when, in closing argument, he referred to the fact that the Jones testimony relating to the precinct identification of appellant "was corroborated by the testimony of Officer Richards." (J.A. 50-51). There can be little doubt that the purpose of the testimony was to establish the accuracy of the Jones identification through Richards.

Since the case turned on the identification point, admission of the police officer's testimony, re-emphasized in the jury's mind by the closing argument, could have served only to unduly prejudice the jury by concluding for it the accuracy of the Jones identification. That identification was significant, and may well have been the persuasive testimony upon which conviction rested. Where, as here, the evidence bearing on the dominant issue of identification presented a crucial and close question, it is evident that the objected to testimony did affect the result, and, unlike Baber, did "create /a/ significant risk of an unjust or irrational verdict." Baber v. United States, supra, Slip Opinion, p. 8

Even if it could be argued that Richards' testimony was admissible for the limited purpose of confirming the statement that Jones did in fact make a prior identification of appellant in the precinct, the jury should have been informed of the limited purpose for its admission. Richards' testimony as to the extra-judicial identification made by Jones was certainly not, in view of the hearsay prohibition, admissible as substantive evidence to show that the identification which Jones made of appellant was in fact correct and accurate. Yet the Court did not so inform the jury, and the declaration was admitted without any explanation or instruction as to its limited effect (J.A. 32, 51-55). In the circumstances, there is little doubt that, without such explanation or instruction, the jury would take the admission as proof of

the truth of Jones' identification. A cautionary instruction was essential, therefore, to point out the limited purpose of the testimony and to minimize the unduly prejudicial effect which the corroboration, where no need for corroboration had been shown, was bound to create in the jury's mind.

Failure to give a cautionary instruction compounded the error in admitting the testimony in the first instance, and, in the circumstances, plainly affected the substantial rights of appellant. Rule 52(b), F. R. Crim. P. The conviction should therefore be reversed and the case remanded for a new trial.

III. The Evidence Directed to Identifying Appellant as the Robber was Insufficient to Enable the Jury to Find Guilt Beyond a Reasonable Doubt

Upon the evidence, a reasonable mind could not have fairly concluded that identification of appellant as the culprit was established beyond a reasonable doubt. Curley v. United States, 81 U. S. App. D. C. 389, 392-93, 160 F.2d 229,232,233 (1946), cert. denied, 331 U. S. 837; Cooper v. United States, 94 U. S. App. D. C. 343, 345-46, 218 F.2d 39, 41 (1954); Hunt v. United States, 316 F.2d 652 (D. C. Cir. 1963).

Appellant consistently denied he was involved. There was never any confession or admission from him.

There were circumstances implicating Anderson which, because they were never satisfactorily explained by the Government, in themselves raised a reasonable doubt as to appellant's guilt. As discussed

in Part I, supra, it was Anderson, not appellant, who had the $5 bill, alleged to have been stolen, in his possession immediately after the offense (J.A. 34). And it was Anderson, not appellant, whose clothes were stained with blood (J.A. 5, 34).

Were Anderson the defendant, his possession of the $5 bill right after the commission of the offense would justify the inference that it was guilty possession, and, "though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence ...". Wilson v. United States, 162 U. S. 613, 619 (1896); Edwards v. United States, 78 U. S. App. D. C. 226, 229-30, 139 F.2d 365, 368-69 (1944), cert. denied, 321 U. S. 769. The presence of blood stains on his clothes also would suggest guilt unless properly accounted for. See Wilson v. United States, supra, at 620. If each of these circumstances in itself may be persuasive, taken together, and unexplained, they are even more compelling evidence of guilt.

In order to overcome the doubts raised as to appellant's guilt by the damaging circumstances pointing to the guilt of Anderson, the Government was required to explain them satisfactorily. It did not. No explanation appears in this record for Anderson's possession of the stolen $5. And no more than a police officer's testimony was offered to account for the blood stains found on Anderson. The officer's testimony that a "check" of the blood found on Anderson and of Miss Donnelly was made and it was

> "Negative, not enough blood to positively identify or the blood type was on there in such a state that it couldn't be identified." (J.A. 34)

was clearly not competent proof of the truth of the fact asserted.

A comparative analysis of blood stains is a matter for expert testimony. People v. Smith, 142 Cal. App. 2d 287, 298 P.2d 540, 543 (1956). No such proof was offered, and thus the significance of the blood stains on Anderson remained unaccounted for on this record. The unexplained non-production of direct and strong evidence, such as the failure to use expert testimony, and reliance instead on inferior and incompetent evidence, raises an inference that the tenor of the direct evidence would have been unfavorable to the Government. Clifton v. United States, 4 How. 242, 247, 11 L. Ed. 953 (1846); Woolard v. District of Columbia, 62 A.2d 640, 641-42 (D. C. Mun. Ct. App. 1948); Wigmore on Evidence, Sec. 285, 290(e)(2) (3d Ed. 1940).

The doubt raised by the unexplained circumstances pointing to Anderson was not dispelled by the evidence bearing on identification of appellant. Particularly apt here is Wigmore's observation that "some of the most tragic miscarriages of justice have been due to testimonial errors in this field, the error chiefly due to imperfect Recollection, with the occasional further complication of defective Perception and of Suggestion." III Wigmore on Evidence, Sec 786a (3d Ed. 1940).

Defects inhered in each of the identifications on which the Government relied. The testimony of the complaining witness, as is shown in detail in Point I above, was worthless because the circumstances surrounding its making were untrustworthy, the reliability of her identification was suspect because of her self-confessed highly

emotional state, and it was in part incapable of belief. Her identification, and that of Mungin and Nelson, were made when appellant was under arrest, a circumstance "calculated to induce a fancied recognition." Colbert v. Commonwealth, 306 S. W. 2d 825, 828 (Ky. Ct. App. 1957). See Point I,above. Both Miss Donnelly and Mungin, strangers to appellant, admitted they had no opportunity to fix facial characteristics, and neither they nor Nelson at any time described appellant other than by the fact that he wore a trench coat. Such a commonly worn item of apparel hardly provides evidence warranting an abiding conviction of guilt. On this record, their testimony amounts to no more than an opinion.

Witness Jones was in a moving car going east on Eastern Avenue during the entire time he said he observed the robbery (J.A. 19-20, 22). Though he claimed that he had a close view of the culprit when he ran across the street in front of his cab, after the attack (J.A.20), the combination of the moving car and a running culprit casts serious doubt on his observations. Jones did not moreover call the police or immediately identify appellant to the police at the scene. He did so at the police precinct station one-half hour later, when he claimed he recognized appellant (J.A. 21,22). But there was no line up which assured the accuracy of that identification. See Wigmore on Evidence, Sec. 786a, p. 164 (3d Ed. 1940).

In view of the steadfast assertion of innocence by appellant, the weaknesses in the testimony of the identifying witness, and the circumstances implicating Anderson which were never satisfactorily explained by the Government, there was no reasonable basis upon which

the jury might conclude beyond a reasonable doubt that appellant was the culprit. While there was evidence here which, if believed, might be said to create a suspicion or even a possibility of defendant's guilt, it was not, considered as a whole, of the clear and convincing character required to sustain a criminal conviction. Cooper v. United States, 94 U. S. App. D. C. 343, 218 F.2d 39 (1954). Since here, as in Farrar v. United States, 107 U. S. App. D. C. at 206, 274 F.2d at 870, it is clear that "upon the evidence *** a reasonable mind must necessarily have had a reasonable doubt as to *** guilt," the District Court erred in denying appellant's motion for judgment of acquittal (J.A. 37,43). The conviction should be reversed with directions to enter a judgment of acquittal.

CONCLUSION

For the reasons stated, the judgment of conviction should be reversed.

Respectfully submitted,

SELMA M. LEVINE
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,034

ROBERT E. LEEPER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALAN KAY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the trial court erred when it accepted evidence by a police officer of a prior identification of appellant after the identifying witness had previously testified without objection to the prior identification, and after three other eyewitnesses had testified that they identified appellant at the scene.

2) Whether the trial court erred in not giving a specific and separate instruction relating to identification when no request for such an instruction was made and the instructions given were proper under the circumstances of the case.

3) Whether the evidence was sufficient to justify the jury's verdict when three witnesses observed appellant first assault the complaining witness on one side of the street, chase her across the street, knock her to the ground and rob her; and two of the witnesses plus the complaining witness identified appellant as the assailant within ten minutes of the commission of the crime after his arrest and another eyewitness identified appellant as the robber approximately forty minutes after appellant's arrest.

INDEX

TABLE OF CASES

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United States Court of Appeals

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ROBERT E. LEEPER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The District of Columbia

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COUNTERSTATEMENT OF THE CASE

On January 21, 1963, a one-count indictment charging appellant with the crime of robbery (22 D.C. Code 2901) was filed in the District Court (J.A. 1). On January 25, 1963, at his arraignment, appellant entered a plea of not guilty (J.A. 1). After trial by a jury, appellant was found guilty as charged (J.A. 56) and sentenced to a term of imprisonment of from five (5) to fifteen (15) years (J.A. 57). From this judgment of conviction appellant appeals.

Government's Evidence Relating To The Robbery

On December 22, 1962, at approximately 4:40 p.m., Miss Caroline Donnelly set out for a mailbox located at the intersection of Kenilworth and Eastern Avenues

(J.A. 4). She was carrying in her hand two Christmas cards and a five-dollar bill (J.A. 4). Approaching Eastern Avenue she passed three men standing near Eastern Avenue (J.A. 4), "and as I [Miss Donnelly] got near to the one, he grabbed me around the neck and—he stood in back of me and grabbed my neck and held me there for a couple of minutes, I guess it was. Then I managed to get away or he let me go." (J.A. 4) She then ran across Eastern Avenue to the District of Columbia side;[1] her assailant chased her across the street, caught her, hit her on the nose and she fell to the ground (J.A. 5). As she stood up, he "grabbed" for her money and the other articles she was holding in her hand (J.A. 5). She saw appellant within ten minutes of the robbery and identified him as her assailant (J.A. 31) and again at trial she identified appellant as the person who hit her, knocked her to the ground, stole her money and identified him as the person who was shown to her ten minutes after the attack (J.A. 5). On Cross-examination she stated that her assailant was wearing a "brownish green or brown * * * raincoat or trench coat" (J.A. 7).[2]

The robbery was witnessed by three persons. Two of the witnesses, Edward Nelson and Issac Mungin were together having just alighted from their parked truck (J.A. 11), and the third witness, John Jones, a taxicab driver, saw the robbery from the taxi he was operating

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[1] The robbery took place on Eastern Avenue, at a point where Eastern Avenue is the dividing line between the State of Maryland and the District of Columbia (J.A. 13). Miss Donnelly was first attacked on the Maryland side of Eastern Avenue and after she escaped she ran across the street to the District of Columbia side of the avenue where her assailant again caught her and committed the robbery (J.A. 4, 5).

[2] Nelson identified the robber as wearing a brown trench coat (J.A. 14); Mungin stated that he was wearing a brown Army coat or gabardine coat and a black hat (J.A. 27); Jones stated that the robber had on a sort of military type coat, olive drab and carried a black hat in his hand (J.A. 21); appellant testified that he was wearing a light Army trench coat, green in color and wore a black hat (J.A. 39).

at the time (J.A. 19). Nelson saw Miss Donnelly "hollering and screaming and all bloody" (J.A. 11), he saw appellant take something out of her hand and run across the street into a liquor store (J.A. 11, 12). Nelson continued to observe appellant until he was taken into custody by a police officer (J.A. 15). Issac Mungin was with Nelson on the corner of Eastern Avenue and Kenilworth Avenue near a grocery store when he first saw a woman, identified as Miss Donnelly (J.A. 25), running across the street "hollering" for help (J.A. 26). Miss Donnelly, who had money in her hand, was being struck in the face by her assailant and was lying on the ground begging for help (J.A. 26). "She was bleeding through the nose and bleeding in the face, everywhere." (J.A. 26). Mungin identified appellant as the person who assaulted and robbed Miss Donnelly (J.A. 26).[3] John Jones, who was driving his taxi along Eastern Avenue on December 22, 1962, "saw a man cross the street and accost a woman" (J.A. 19). He saw the man place his arm around the woman's neck and they "scuffled" to the ground. "The man jumped up and ran across the street, right across in front of my automobile and by that time, I was very close to him" (J.A. 20). Jones drove through the liquor store parking lot in an attempt to find the assailant who did in fact come into the parking lot and "I got a good view of him, but I could not stop him" (J.A. 20). Jones

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[3] When asked by defense counsel how he knew that appellant was the assailant, the following colloquy took place (J.A. 28, 29):

Mungin: Because I stood there and watched him all the time. He had this coat on and I was watching when he was going to come out.

Miller: Did you ever lose sight of this person?
A. No, I never lose sight of him.
Q. Did he go into the store?
A. Yes.
Q. Well, you lost sight of him then, didn't you?
A. No, I couldn't lose no sight of him. There is glass all around in the window and I looked in there and I seen him in there, and I was standing on the corner there.
Q. So you never lost sight of him?
A. No, I couldn't lose sight of him.

then proceeded to take his passenger to Union Station and from there drove to No. 14 Precinct Station arriving at approximately 5:15 p.m. (J.A. 20) to report what he had seen (J.A. 22). At the station Jones saw the appellant and identified him as the person he had seen accost Miss Donnelly and then run into the parking lot (J.A. 20).

Officer Richards of the Metropolitan Police Department responded to the scene shortly after 4:40 p.m. on December 22, 1962, and placed appellant under arrest[4] (J.A. 31). In his presence, Miss Donnelly identified appellant as the person who had just assaulted her and taken her money (J.A. 31). Over objection Officer Richards testified that Jones identified appellant at the police station as the person he had seen assault Miss Donnelly (J.A. 32). Appellant denied the fact of the Jones identification at the Precinct Station, asserting Jones was not at the station (J.A. 41).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistence or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 52, Federal Rules of Criminal Procedure provides in part:

> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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[4] When Officer Richards arrived at the scene appellant was being held by a citizen (J.A. 35).

SUMMARY OF ARGUMENT

I

The testimony of Officer Richards relating to an identification of appellant at the Precinct Station, shortly after the robbery, by one of the eyewitnesses, was competent as primary evidence of the act of identification. Even if the testimony is viewed as corroborative it was cumulative. The identifying witness testified that he had identified appellant at the Precinct Station and three other witnesses testified that they had identified appellant as the robber at the scene of the crime.

II

The trial court did not commit reversible error in failing to charge the jury separately and distinctly that the question presented to them was primarily one of identification, where the appellant did not request any special instructions nor did he object to the instructions given. The instructions given fully complied with the standards previously set by this Court.

III

Appellant's contention that the evidence does not support the verdict is frivolous. The testimony of four eyewitnesses identifying appellant as the person who committed the robbery constituted sufficient evidence for the jury to find appellant guilty. It was for the jury to weigh the evidence, determine the credibility of the witnesses and to resolve the conflicts in the testimony.

ARGUMENT

I The police officer's testimony that a witness identified appellant as the robber was properly admitted

The main thrust of appellant's argument seeking reversal of his conviction is that the trial court erred in

admitting over objection the testimony of Officer Richards that the witness Jones identified appellant at the Precinct station as the perpretrator of the robbery. Appellant takes the view that such testimony is hearsay rising to the gravity of reversible error.

Whether or not testimony of a prior identification is plainly hearsay is questionable. *Baber* v. *United States*, No. 17,348, decided June 27, 1963; *People* v. *Gouled*, 54 Cal. 2d 621, 354 P.2d 865 (1960). As this Court held in *Baber*, the hearsay rule is primarily designed to exclude extra-judicial declarations that are introduced to prove the truth of their content. Moreover, the principal danger of admitting hearsay is not present here where the identifying witness was present and available for cross-examination. In the instant case the testimony of the police officer merely proved the fact of the collateral identification at the station.

The traditional reluctance on the part of many courts to admit testimony that appears to corroborate a prior identification by a witness through a witness who heard or viewed the prior identification has yielded to reason.[5]

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[5] *Rich* v. *United States*, 261 F.2d 536 (4th Cir. 1958), *cert. denied*, 359 U.S. 946; *Solf* v. *State*, 227 Md 192, 175 A.2d 591 (1961); *People* v. *Gouled*, 54 Cal. 2d 621, 354 P.2d 865 (1960); *Mack* v. *United States*, D.C. Mun. App., 150 A.2d 477 (1959); *Basoff* v. *State*, 119 A 2d 917 (Md. 1956); *State* v. *Frost*, 105 Conn. 326, 135 Atl. 446 (1926); Annot., 71 A.L.R. 2d 449 (1960); IV WIGMORE, EVIDENCE (§ 1130 3d ed. 1940). In a forceful criticism of the ruling in *People* v. *Jung Hing*, 212 N.Y. 393, 106 N.E. 105 (1914), excluding an identification made at a police station just after arrest to corroborate the witnesses' identification in court, the author stated:

> [I]t is really astonishing how reluctant modern Courts are to accept this bit of commonsense; the learned judge's reference to the above text (§ 1130) pays it an undeserved compliment; because the above text unfortunately failed to express itself, as intended, to the learned reader; the text means to say that a prior act or utterance of identification by a now witness is, or ought to be, admissible *in chief*, whenever identity is in dispute, *without any conditions whatever as to impeachment on the ground of recent contrivance or any other ground*. (emphasis of author) Id. n.2

It cannot be gainsaid that the best evidence of identification is usually the first identification. Moreover, it is not merely the fact that an accusation or identification is made in the defendant's presence on the day of the crime or shortly thereafter that makes it relevant, but an identification then made is relevant to establish the act of identification at the time when it had the greatest probative value. The identification of appellant by Jones as testified to by Officer Richards was a fact that he witnessed personally and his testimony was not merely corroborative but rather primary evidence. Even assuming *arguendo* that Officer Richards' testimony was corroborative, an identification made in court frequently has little testimonial value when compared with an identification made shortly after the commission of the crime, as in the instant case, and such evidence ought to be admissible to corroborate the identification made in court. *Commonwealth* v. *Locke*, 335 Mass. 106, 138 N.E. 2d 359 (1956).

Without conceding that *Mellon* v. *United States*,[6] relied upon by appellant, states the now controlling view, the case has doubtful vitality in this and many other jurisdictions.[7] Additionally when the corroborative statements are merely cumulative or where as in the instant case, apart from the statement, there is more than ample evidence to support the verdict of the jury, the admission of the corroborating statements does not constitute reversible error. *Baber* v. *United States*, *supra*; *Goldberg* v. *United States*, 213 F.2d 734 (4th Cir. 1954); *United States* v. *Forzano*, 190 F.2d 687 (2d Cir. 1951); *Beaty* v. *United States*, 203 F.2d 652 (4th Cir. 1953); *Harrod* v. *United States*, 58 App. D.C. 254, 29 F.2d 454 (1928); *Bierndt* v. *United States*, 3 F.2d 141 (7th Cir. 1924). In the case at bar, as in *Baber*, *supra*, the testimony of the police officer, whether viewed as primary or corroborative evi-

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[6] 170 F.2d 583 (5th Cir. 1948).

[7] *Baber* v. *United States*, *supra*. See generally Annot., 71 A.L.R. 2d 449 (1960).

dence, was merely cumulative for the purpose of showing that Jones identified appellant as the perpetrator of the robbery of Miss Donnelly. Jones had previously testified that he identified appellant at the Precinct station (J.A. 20).

II Failure of the court to specifically charge the jury that they must resolve the conflicting evidence relating to identification was not "plain error"

Appellant maintains that the failure of the trial court to separately and specifically instruct the jury that the question presented to them was primarily one of identification of appellant as the assailant was "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. The record affirmatively indicates that immediately prior to counsel's closing argument, the court called counsel to the bench and asked them whether any special instructions were requested, to which appellant's counsel answered that he did not request any specific instructions (J.A. 43). At the conclusion of the court's charge to the jury he again asked counsel whether they objected to any portion of the charge or wished any additional instructions, whereupon appellant's counsel again answered in the negative (J.A. 57). Since appellant had the burden of requesting any special instructions he thought necessary and objecting to that portion of the court's charge he deemed to be inadequate, his failure to discharge that burden precludes him from assigning error to the court's instructions for the first time in this Court. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); *Obery* v. *United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), *cert. denied*, 349 U.S. 923 (1955); *Willis* v. *United States*, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959).

Even if appellant's objection were timely it cannot be sustained. This Court had occasion to reach the same untimely objection in *Obery* v. *United States*, *supra*, and held that an instruction similar to the instant charge did

not constitute plain error[8] in the face of this contention. In *Obery*, as in the instant case, appellant relied upon *McKenzie* v. *United States*;[9] however, the facts in *McKenzie*, are sufficiently distinguishable to make it inapposite.[10] The instructions attacked here fully met the standard enunciated in the *Obery* case.

III There was overwhelming evidence to support the jury's verdict of guilty

Appellant's attack upon the sufficiency of the evidence to support the jury verdict and his contention that the Government's evidence relating to the identification of appellant as the robber was "weak and unreliable" is utterly lacking in merit and defies credulity. The victim of this iniquitous assault and robbery identified appellant

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[8] Compare the portion of the charge attacked in the instant case (J.A. 53, 54) with the following portion of the charge approved in *Obery*:

> The law is that this defendant is presumed to be innocent. The burden of proof is upon the Government to prove him guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that this defendant has committeed every element of the offense charged, then you on the jury must find the defendant not guilty.
>
> * * * *
>
> In determining whether the Government has established the charge against this defendant you must consider and weigh the testimony of all the witnesses who have appeared before you. You are the sole judges of the credibility of the witnesses. In other words, you must determine what witnesses to believe and to what extent to believe them. 95 U.S. D.C. 28, 29 n. 3.

[9] 75 U.S. App. D.C. 270, 126 F.2d 533 (1942).

[10] The conviction and resultant sentence of the extreme penalty in *McKenzie*, rested largely upon the testimony of the complaining witness without substantial supporting evidence. Under the facts in that case the inconsistent and vague identification by the complaining witness assumed signal importance and the court reversed the conviction because, *inter alia*, the trial court failed to instruct in precise terms that unless the jury found from the evidence beyond a reasonable doubt that all the elements of the crime charged existed, they must acquit the defendant.

as her assailant within ten minutes of the commission of the crime (J.A. 35). Three bystanders witnessed the crime and positively identified appellant as the perpetrator of the robbery. That appellant claimed innocence, that a companion of appellant was apprehended at the scene possessing a bank note of the same denomination stolen from the victim of the robbery, are questions of credibility and fact to be resolved by the jury and add no substance to appellant's argument for reversal. *Cf. Woolridge* v. *United States*, 97 U.S. App. D.C. 67, 228 F.2d 38 (1956); *Word* v. *United States*, 199 F.2d 625 (10th Cir. 1952), *cert. denied*, 345 U.S. 936. If, as appellant ostensibly requests this Court to find, a defendant can create a reasonable doubt by merely denying participation in the crime, then few if any violators of the law could be brought before the bar of justice and punished. This Court has repeatedly held that it will not substitute its judgment for that of the jury. *Trent* v. *United States*, 109 U.S. App. D.C. 152, 284 F.2d 286, *cert. denied*, 365 U.S. 889, *reh. denied*, 366 U.S. 978 (1960); *Epps* v. *United States*, 81 U.S. App. D.C. 244, 157 F.2d 11 (1946).

Appellant belabors isolated statements in the testimony of the identifying witnesses in an attempt to show that the assault and robbery was so expeditiously executed as to preclude positive identification of appellant. The extracted testimony with which appellant seeks to predicate reversal was before the jury at the time of trial and, out of context, cannot form the basis for reversal on sufficiency of the evidence. Conceding that the assailant did not permit the eyewitnesses to view him with the deliberate contemplation required by a portrait painter, nevertheless the testimony of the witnesses, if believed by the jury, was more than sufficient to persuade them that the individual, whom the witnesses observed commit the robbery, was in fact the appellant. Certainly recollection by eyewitnesses of every minute detail of a criminal's features, build, clothing and other identifying characteristics would be desirable in every case, but experience has demonstrated that such testimony is rarely attainable. However, it should be noted that in the instant case

two witnesses testified that they never lost sight of the appellant from the time that he committed the robbery until he was apprehended (J.A. 15-17, 29). All four identifying witnesses described appellant's outer garment as a brown or green raincoat or trench coat and appellant was arrested and identified within ten minutes of the robbery across the street from the locus delicti. Appellant's characterization of this testimony as "weak and unreliable" is untenable and appellee submits that it is overwhelming and more than sufficient to support the jury verdict.

The jury, as the triers of the facts, is charged with the duty of determining the credibility of the witnesses, resolving any conflict in the testimony and accepting or rejecting such parts of the testimony as it sees fit. *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954). It is the jury's function to pass upon the powers of observation of the witnesses, *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951), and it is the jury's function to determine whether or not appellant was sufficiently identified as the perpetrator of the robbery. *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 863 (1960); *Bell* v. *United States*, 108 U.S. App. D.C. 169, 280 F.2d 717 (1960); *William* v. *United States*, 108 U.S. App. D.C. 384, 282 F.2d 867, *cert. denied*, 365 U.S. 836 (1960). The jury having returned a verdict of guilty, their verdict must be sustained where there is substantial evidence to support it taking the view most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947); *cert. denied*, 331 U.S. 837; *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28 (1945), *cert. denied*, 324 U.S. 875.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALAN KAY,
Assistant United States Attorneys.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,034

ROBERT E. LEEPER, JR.,
Appellant

v.

UNITED STATES,
Appellee

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF ROBBERY ENTERED BY THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SELMA M. LEVINE
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

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Authorities Cited

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REPLY BRIEF FOR APPELLANT

I

Conspicuous by its absence from appellee's brief is any reference whatever to one of the damaging circumstances which pointed to the guilt of a man other than appellant, and which was never competently explained by the government. This was the presence of blood stains on one Anderson when, by the Government's own testimony that the culprit "went down" with the victim, blood stains would have been expected on appellant. None were found.

Nor is there anything more than a fleeting reference to the unexplained circumstance that the five dollar bill stolen from the victim was found on Anderson, not appellant. That reference, in fact,

only underscores appellant's contention that adequate explanation in this record is missing. The Government attempts to dismiss this circumstance by suggesting no more was involved than that Anderson was arrested "possessing a bank note of the same denomination stolen from the victim of the robbery." (Govt. Br. 10). There is no support for this implication of coincidence. On the contrary, the Government's own witness, the arresting police officer, made clear that the bill which was found on Anderson was in fact the five dollar bill which was stolen from the victim (J. A. 34). 1/ No other reason appears in this record for his possession of the bill. Appellant, on contrast, had only seven cents on him at the time of his arrest, within ten minutes after the offense, and though at least one Government witness claimed to have watched him continually, there is no evidence showing possession or disposition of such a bill by him during this period.

What is striking, moreover, is appellee's failure to deal at all with appellant's contentions as to the impact of these circumstances. Unexplained by competent evidence, these circumstances had impressive weight in determining how imperative was an identification instruction here. They are in themselves sufficient to distinguish this case from Obery v. United States, 95 U. S. App. D. C. 28, 217 F.2d 860, cert. denied, 349 U. S. 923 (1955), and to bring it within

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1/ Question by defense counsel:

> "Do you know the $5.00 that we are speaking of with respect to the robbery, where was this $5.00 found if in fact it was found? A. It was found on another defendant whom we had charged at the same time with the same crime."

McKenzie v. United States, 75 U. S. App. D. C. 270, 126 F.2d 533 (1942).

In Obery, this court's decision that an identification instruction was unneeded for proper consideration of the case by the jury rested upon the credible and strong evidence of guilt present there, including a confession, and the absence of any real doubt raised on the record. There is doubt on this record. Here, as in McKenzie, and unlike Obery, appellant never confessed or made any admissions. Here, as in McKenzie, the evidence of the complaining witness in particular was weak. Moreover, the unexplained circumstances had a double impact of pointing to another man and of casting grave doubt upon appellant's guilt. It was one of these circumstances alone -- lack of possession of the stolen money -- which was a significant factor in the decision of this Court in McKenzie to reverse a conviction for failure to instruct on identification, though no such instruction was requested.

II

Nowhere does appellee meet appellant's argument that, offered without limitation, the testimony of Richards to an extra-judicial identification by Jones constituted prejudicial error because it served to conclude the issue of the accuracy of Jones' identification for the jury.

What was the reason for adducing the testimony of a third party as to the Jones precinct identification of appellant -- to corroborate the fact that Jones had made an identification in the precinct station, or to establish the accuracy of that identification? Appellee

asserts, without more, that the Richards testimony was relevant only to corroborate the fact that Jones had made an identification at the precinct station -- "the testimony of the police officer merely proved the fact of the collateral identification at the station." (Govt. Br. 6).

Admission of the testimony even for the limited purpose appellee claims is objectionable in view of the long standing rule against admission of prior consistent statements of witnesses. There is no question on this record that Jones' credibility had not been attacked at the time Richards testified to the out-of-court identification by Jones, and Richards' testimony added nothing of probative value. No need for it was shown.

The rule still has vitality in the Federal courts. It was recognized in Baber. In United States v. Leggett, 312 F.2d 566 (4th Cir. 1962), a prosecution for false impersonation of a United States officer, the Court applied the rule to bar admission of a third person's testimony to bolster a prosecution witness on the sharply controversial central issue as to the capacity in which the defendant represented himself. 2/ In so doing, the Court explained the reason for the Rule (312 F.2d at 572):

2/ An earlier Fourth Circuit case cited by appellee (p.7, fn. 5) Rich v. United States, 261 F.2d 536, 538 (4th Cir. 1958), cert. denied, 359 U. S. 946, has nothing to do with admissibility of a prior identification.

> "The great weight of authority is to the effect that the testimony of a witness cannot be fortified or corroborated by showing that he has previously told the same story out of court. Otherwise a person might concoct an entirely false account of some happening and, after relating this account to a dozen of his neighbors, might call them in corroboration when at a later time he told the same untruthful story on the witness stand ..."

Reversal was ordered despite the Government's argument that admission of the bolstering testimony was harmless error.

Where, as here, identification is in issue, and testimony as to a prior extra-judicial identification comes not from the identifier but from a third party who heard or observed the identification, the rule barring out-of-court consistent statements has particular force. In Colbert v. Commonwealth, 306 S. W. 2d 825 (Ky, 1959), the Court adopted the view that evidence by a witness of his own previous identification of the defendant, under circumstances reasonably free of improper influences, was competent. That of the arresting officer, a third party, relating to the complaining witness' prior identification of defendant in a line-up was deemed inadmissible, and the error was held to be reversible. Accord, Gnolar v. State, 203 Miss. 371, 35 So. 2d 706, 707 (1948).

The distinction drawn by the court in Colbert is sound. Testimony of an observer to an extra-judicial identification involves "the most flagrant violation of the hearsay rule ... A person, not the witness, has made an out-of-court statement, which was offered in evidence for the truth of the assertion which it contained." Comment, Extra Judicial Identification, 19 Md. L. Rev. 201, 218-19 (1959). Yet the observing witness, Richards in this case, had no knowledge of whether the substance of the Jones assertion was true.

In any event, what is crucial here is that, even if it were proper to adduce from a third party like Richards testimony as to Jones' prior identification of appellant, such testimony would have to be limited in the jury's mind to the fact of prior identification. See Mack v. United States, 150 A.2d 477, 479 (D. C. Mun. Ct. App. 1959). It would run afoul of the hearsay prohibition were it used as substantive evidence of the facts asserted. Appellee indeed appears to agree that the testimony could not properly have served to prove that Jones was right when he said appellant was the culprit. Quite obviously, for Richards could not know that Jones was right.

But the record does not show that the Richards testimony served the limited purpose now claimed for it by appellee. The United States Attorney did not offer the testimony merely to prove the fact of a prior identification (J. A. 31-32). Nor was any such limitation imposed by the court upon the jury either at the time of admission or in the instructions (J. A. 32, 51-55). Nothing was said. In the circumstances of this case, therefore, the admission over objection was erroneous because it was bound to be taken by the jury for a hearsay purpose, as establishing that Jones was right, and there was no instruction cautioning the jury that it was not to be so taken.

The error was not harmless. There can be little doubt that the testimony had weight with the jury in resolving the conflict in the identification evidence, the dominant issue in the case.

Respectfully submitted,

SELMA M. LEVINE
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)